CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 676

GEORGE S. BEADLE, PETITIONER,

vs.

ALFRED SPENCER

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED JANUARY 3, 1936.

CERTIORARI GRANTED FEBRUARY 17, 1936.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No.

GEORGE S. BEADLE, PETITIONER,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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[fol. 1]

IN SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

No. 234720

ALFRED SPENCER, Plaintiff,

vs.

BEADLE STEAMSHIP COMPANY, LTD., a Corporation, GEORGE S. BEADLE, Black-White Company, a Corporation, Jim Doe Company, a Corporation, Black and Blue, a Co-partnership, Richard Roe and Mary Miles, Defendants

FIRST AMENDED COMPLAINT—Filed June 29, 1932

Not comes the plaintiff and upon stipulation of counsel and leave of Court being first had and obtained, files this first amended complaint and for cause of action alleges:

I

That the defendant, Beadle Steamship Company, Ltd., is and was at all times herein mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of California, and maintaining a main office and principal place of business in the City and County of San Francisco, State of California.

II

That the defendants, or some of them, were at all times herein mentioned, in the possession of and were the owners of and were operating that certain vessel known as the S. S. Fort Bragg. That plaintiff is not certain as to just which of said defendants were so in the possession of and were [fol. 2] the owners of and operating the said S. S. Fort Bragg, at the times herein mentioned and prays that the defendants be put upon answer to this allegation.

III

That the names Black-White Company, a corporation, Jim Doe Company, a corporation, Black and Blue, a co-

partnership, Richard Roe and Mary Miles are to designate defendants whose true names are not at this time known to plaintiff and that said names are fictitious and plaintiff prays that when said true names are ascertained that this first amended complaint may be amended accordingly; and that such defendants are added solely for the reason that plaintiff is in doubt as to what particular defendant was actually in the possession of, and was the owner of, and was operating the said vessel at the time of the accident hereinafter referred to.

IV

That for some time prior to and on or about May 4, 1931, plaintiff had been and was a seaman on board the S. S. Fort Bragg, and a member of the crew thereof, and as such was in the employ of the defendants or some of them; that plaintiff is not certain as to which of said defendants was his actual employer, and for that reason prays that said defendants be put upon answer regarding same.

V

That on or about said date of May 4, 1931, about 9:00 o'clock A. M., the plaintiff was engaged as such seaman and [fol. 3] as a member of the crew of the said S. S. Fort Bragg on board said vessel while docked at Vallejo, California, helping to unload a deck cargo of lumber aboard said vessel, and was under the direction of the defendants engaged in making up sling loads of flat lumber for unloading, and was, in the course of his duties, standing on the lumber landed on the deck of the vessel, near the hatch-coaming on the port side thereof, and was so engaged in the course of his duties under the direction and control of said defendants as his employer or employers, when the defendants, who were in the possession of and who were the owners of and who were then and there employing said plaintiff as a member of the crew to help unload said deck cargo of lumber, and which said defendants were then and there the employer or employers of said plaintiff, had so negligently loaded the said vessel with its deck cargo of lumber and were so negligently carrying on the unloading operations on said vessel at said time and place of said unloading, by so negligently landing the lumber on the deck, upon which lumber plaintiff was compelled to stand in the

course of his duties, and by negligently failing to secure said landed lumber by blocking or otherwise to prevent shifting or toppling of the landed sling-loads of such lumber, and by negligently landing said lumber too close to the hatch-coaming of said vessel and the open hold thereof, and by so negligently leaving the hold open while plaintiff was working in the course of his duties to unload said deck cargo, there being no cargo passing into or from said [fol. 4] hold that entire day, and by so negligently failing to have a safety line stretched around the hatch-coaming to protect this plaintiff from falling into said open hold, and by so negligently failing to furnish plaintiff with a safe place to work on said vessel, that by reason of the aforesaid negligence and all of said negligent acts, the landed lumber on which plaintiff was standing, shifted and toppled under plaintiff and by reason of all of the aforesaid negligent acts the plaintiff was caused to, and said defendants did by reason of all of such negligent acts cause plaintiff to, and he did, fall with great force and violence from the top of said landed sling-loads of lumber, through the open hatch-way and into the open hold of said vessel, thus causing him to fall about eighteen feet into the hold, causing the plaintiff grievous shock and injury and much pain and suffering and the following additional specific injuries to plaintiff, to-wit: a fracture of the right astragalus, dislocation of the right metacarpo-phalangeal joint, and a serious sprain of the left ankle, and a falling down of the arch of the right foot, and in addition thereto, knocking loose three of plaintiff's lower front teeth, which subsequently had to be taken out about three months after said date of May 4, 1931, by reason of their failure to again become firm in plaintiff's jaw.

That as a result of said negligence of said defendants the plaintiff was confined in the Marine Hospital at San Francisco, California, from May 4, 1931 to May 22, 1931, when [fol. 5] he was placed in an out-patient status. As a further result of the negligence of said defendants and at the insistence of said defendants, the plaintiff entered the Saint Francis Hospital at San Francisco, California, on June 17, 1931, and at the request of the defendant Beadle Steamship Company, Ltd., underwent an operation on June 19, 1931, as a result of the negligence of said defendants and in order to mitigate the seriousness and the permanence of the

aforesaid injuries of said plaintiff by reason of said negligence, in which said operation plaintiff's right arm and right hand around the thumb were cut open for the purposes of correcting the result of the injuries to said right hand of plaintiff, received as aforesaid, and thereupon plaintiff's right hand and arm, half way to the elbow, was placed in a plaster cast. That as a result of said operation this plaintiff suffered extreme and continued pain and discomfort and worry and apprehension. That on entering said hospital, plaintiff's right foot, which had been injured as aforesaid as a result of the negligence of the defendants on May 4, 1931, was placed in a plaster cast which cast remained on until on or about July 15, 1931. That plaintiff was not released from said hospital until July 17, 1931.

That thereafter plaintiff suffered extreme and continued pain in said right foot which was injured at said time and place as aforesaid, to-wit: on May 4, 1931, and during all of said time was suffering continued pain and discomfort and lack of use of his left ankle. At the request of the defend- [fol. 6] ant, Beadle Steamship Company, Ltd., x-rays of said right foot were taken and at the request of the said defendant, the plaintiff again entered the Saint Francis Hospital at San Francisco, California, on October 1, 1931, and at the request of said defendant was again operated, on or about October 3, 1931, in an endeavor to mitigate the injuries received by said plaintiff on May 4, 1931, in which said operation an incision was made in plaintiff's right foot and a piece of bone taken out of said foot. That plaintiff was released from said hospital on November 8, 1931. That thereafter and up to the summer of 1932, plaintiff was and is still partially disabled and in a weakened and unstable condition and his right ankle has not fully recovered, and the left ankle still gives pain, and that said injuries are permanent to the extent that plaintiff will always be deprived of the use of said right thumb to a considerable extent and that said right thumb is permanently stiffened and that plaintiff will never have the full use of his said right foot, and that the loss of plaintiff's three lower front teeth constitute a permanent injury and that plaintiff by reason of the aforesaid negligence of the defendants has suffered extreme and continued pain and considerable apprehension and worry and that plaintiff's earning ability was entirely destroyed by said injuries up to May 1, 1932,

and since that time has been and will continue to be considerably diminished, and plaintiff is now, at the time of the filing of this First Amended Complaint, able to do only light work, and cannot follow his usual vocation of a sea-
[fol. 7] man at all, and plaintiff will always be permanently disabled to some extent, all to plaintiff's damage in the sum of $35,000.00, which has not been paid nor any part thereof.

VI

That there was no cargo loaded into nor any cargo taken out of said hold on said May 4, 1931, the day of said injuries to plaintiff, nor was said hold used that day. That the said lumber on which plaintiff was thus compelled to stand in the course of his duties, while unloading said deck cargo of lumber, was not piled but was landed on the deck, where it lay as landed sling-loads, without piling or arranging the separate pieces of lumber. That in negligently failing to pile said lumber on which plaintiff was standing at the time of said injuries to plaintiff, and negligently failing to secure the said deck cargo of lumber on which plaintiff was working to prevent shifting or toppling, and in negligently piling said lumber too close to said open hold and hatch-coaming thereof, and in negligently failing to protect the open hold by a safety line and by negligently leaving said hold open when this plaintiff was working in the course of his duties so close to said open hold, the said hold not being used that entire day, the defendants violated well-known safety rules.

Wherefore, plaintiff prays that the above entitled cause be tried before a jury and that he recover of and from said defendant employers the sum of $35,000.00 damages and costs of suit herein, and such other and further relief as
[fol. 8] to the above entitled Court may seem just.

A. Don Duncan, Attorney for Plaintiff.

(*Duly sworn to by Alfred Spencer. Jurat omitted in printing.*)

[File endorsement omitted.]

IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

ANSWER TO FIRST AMENDED COMPLAINT—Filed July 5, 1932

Now comes Beadle Steamship Company, Ltd., a corporation, and George S. Beadle, two of the above-named defendants, and for an answer to the First Amended Complaint of the plaintiff on file herein, admit, deny and allege as follows:

I

Admit the allegations of paragraphs I, II, and IV of the First Amended Complaint.

II

Deny the allegations of Paragraph III of the First Amended Complaint.

III

Answering unto the allegations of paragraph V, said defendants admit that on or about said date of May 4th, 1931, the plaintiff was engaged as a seaman and as a member of the crew of the said steamship "Fort Bragg" on board said vessel while docked at Vallejo, California, helping to [fol. 9] unload a deck cargo of lumber aboard said vessel, and was under the direction of the defendant, Geo. S. Beadle, engaged in making up sling loads of flat lumber for unloading and was, in the course of his duties, standing on the lumber landed on the deck of the vessel near the hatch coaming on the port side thereof; admit that defendant Geo. S. Beadle was then and there employing said plaintiff as a member of the crew to help unload said deck cargo of lumber; deny each and every allegation of paragraph V not hereinabove expressly admitted.

IV

Deny the allegations of paragraph VI of the First Amended Complaint.

Further answering unto the First Amended Complaint on file herein, and for a First Affirmative and Separate Defense thereto, said defendants allege as follows:

I

That on the 4th day of May, 1931, the plaintiff, while performing his ordinary duties as a seaman aboard the steam schooner "Fort Bragg" fell from a deckload of lumber on said vessel into the hold of the said vessel, and that the defendants did not cause the plaintiff to fall into the said hold; that the risk of falling from said deckload of lumber was obvious and apparent, and was one of the risks of plaintiff's employment as a seaman; that the plaintiff assumed the risk of falling from said deckload of lum-
[fol. 10] ber; that the plaintiff assumed all the apparent and obvious risks incidental to his employment as a seaman aboard the said vessel, and that if any injuries were sustained by plaintiff, such injuries were proximately and directly caused by a risk assumed by the plaintiff.

Further answering unto the First Amended Complaint on file herein, and for a Second Affirmative and Separate Defense thereto, said defendants allege as follows:

I

That on the 4th day of May, 1931, the plaintiff, while performing his ordinary duties as a seaman aboard the steam schooner "Fort Bragg," fell from a deckload of lumber into the hold of the said ship, as a direct and proximate result of the plaintiff's own carelessness and negligence in the performance of his said duties; that in the performance of his said duties he acted without regard to his own safety; that he failed and neglected to exercise ordinary, or any, care toward the safety of his own person, and that if the plaintiff has received any injuries as a result of falling from said deckload, said injuries were caused by the recklessness, carelessness and negligence of the plaintiff.

Wherefore, said defendants pray for judgment and for their costs of suit incurred herein.

Sawyer & Cluff, Attorneys for defendants, Beadle Steamship Company, Ltd., and George S. Beadle.

(*Duly sworn to by George S. Beadle. Jurat omitted in printing.*)

[fol. 11] [File endorsement omitted.]

Received Jul. 5, 1932.

A. Don Duncan, Attorney at Law.

IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

VERDICT—Filed Jan. 10, 1933

We, the jury in the above-entitled cause, find a verdict in favor or plaintiff and against the defendant George S. Beadle and assess the damages in the sum — Ten Thousand Dollars $10,000.00 Dollars.

Louis D. Saylor, Foreman.

[File endorsement omitted.]

IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

JUDGMENT ON VERDICT—Filed Jan. 16, 1933

This cause came on regularly for trial A. Don Duncan, Esq., appearing as counsel for the plaintiff, and Messrs. Sawyer & Cluff for the defendant.

Thereupon, a jury of 12 persons was duly accepted, empaneled and sworn to try said cause. Witnesses on the part of the plaintiff and defendant were duly sworn and examined, and certain documentary evidence was introduced.

Whereupon, after hearing the evidence, the arguments of Counsel and instructions of the Court, the cause was submitted to the jury, who retired to deliberate upon their verdict, and subsequently returned into court, and, being [fol. 12] called, all answered to their names, and then rendered the following verdict, which was accepted by the Court and entered on the minutes, as follows:

We, the jury in the above-entitled cause, find a verdict in favor of plaintiff and against the defendant George S. Beadle and assess the damages in the sum of Ten Thousand Dollars $10,000.00.

Louis D. Saylor, Foreman.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed, that Alfred Spencer plaintiff do have and recover from George S. Beadle defendant, the sum of Ten Thousand & no/100 Dollars ($10,000.00) $7,000., with interest thereon at the rate of seven percent per annum from the date

hereof, till paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of $417.25. (In red ink:) Mch 1/1933. Reduced to $7000.—by order of Court. G. A. Weihe, D. C. C.

[File endorsement omitted.]

IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

STIPULATION CONSENTING TO A REDUCTION OF THE PRINCIPAL AMOUNT OF JUDGMENT AS CONDITION TO DENIAL OF MOTION FOR NEW TRIAL—Filed March 1, 1933

Pursuant to the conditional order of the above entitled court, made and filed herein on February 27, 1933, ordering that the motion of George S. Beadle, defendant herein, [fol. 13] for a new trial be granted on the ground of excessive damages, unless the plaintiff herein file a written stipulation consenting that the principal amount of said judgment be reduced from $10,000 to $7,000, said written stipulation to be filed herein on or before March 4, 1933, and that said motion for a new trial be denied if such stipulation is filed.

Pursuant to said order, it is hereby stipulated and agreed by Alfred Spencer, the above named plaintiff that said plaintiff consents that the principal amount of the judgment herein be reduced from $10,000 to $7,000, and that said motion for new trial be denied.

Dated San Francisco, California, March 1, 1933.

Alfred Spencer, Plaintiff; A. Don Duncan, Attorney for Plaintiff.

Witness to signature of Alfred Spencer: Isabelle Stewart.

[File endorsement omitted.]

IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

ORDER DENYING MOTION FOR NEW TRIAL—Filed March 1, 1933

Pursuant to the order of this court made and filed on February 27, 1933, ordering that the motion of George S.

Beadle defendant herein, for a new trial be granted on the ground of excessive damages unless the plaintiff should file herein within five days from said date of stipulation consenting that the principal amount of said judgment be reduced from $10,000 to $7,000.

[fol. 14] And the plaintiff, Alfred Spencer, having filed in this action on this 28th day of February, 1933, his written stipulation consenting that the principal amount of said judgment be so reduced and the plaintiff having fully complied with the condition of said order of February 27, 1933, and good cause appearing therefor,

It is hereby ordered, that the motion for new trial of George S. Beadle, defendant herein, be, and it is hereby denied and

It is further ordered that the principal amount of the judgment heretofore entered herein be reduced from the sum of $10,000 to the sum of $7,000, and the clerk of this court is hereby authorized and directed to correct the principal amount of said judgment accordingly; this order not to affect the amount of plaintiff's costs already taxed.

Dated San Francisco, California, March 1, 1933.

Edmund P. Mogan, Judge of the above entitled Superior Court.

[File endorsement omitted.]

(Clerk's certificate to judgment omitted in printing.)

IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

NOTICE OF APPEAL—Filed March 7, 1933

To the Honorable Edmund P. Morgan, Judge of said Superior Court, to Alfred Spencer, plaintiff in the above-entitled action, and to A. Don Duncan, Esq., his attorney:

[fol. 15] You, and each of you, will please take notice that George S. Beadle, the defendant in the above-entitled action, hereby appeals to the District Court of Appeal, First Appellate District, of the State of California, from the judgment in said action rendered in favor of the plaintiff, Alfred Spencer, and against the defendant, George S.

Beadle, and entered on the 16th day of January, 1933, in Judgment Book 341, Page 104 of the records of the Superior Court of the State of California, in and for the City and County of San Francisco, and from the whole of said judgment.

Dated March 7th, 1933.

Sawyer & Cluff, Attorneys for Defendant.

Receipt of a copy of the within Notice of Appeal is acknowledged this 7th day of March, 1933.

A. Don Duncan, Attorney for Plaintiff.

[File endorsement omitted.]

IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

NOTICE AND REQUEST FOR TRANSCRIPT—Filed March 7, 1933

To the Clerk of the above-entitled Court:

Please take notice that the defendant, George S. Beadle, in the above-entitled action desires to appeal from the judgment in said action, and hereby requests that a transcript of the testimony offered or taken, evidence offered or received, and all rulings, instructions, acts or statements of the Court, also all objections or exceptions of counsel, and all matters [fol. 16] to which the same relate, and also all proceedings taken on motion for new trial and all matters to which the same relate, including all minute orders and written orders pertaining to said motion for new trial, and also the record of defendant's motion for non-suit, defendant's motion for a mistrial, defendant's motion for a directed verdict, defendant's request for a special verdict and written findings of fact, defendant's motion for judgment notwithstanding the verdict together with the Court's ruling on said motions and requests and all written documents filed with the Court in support of or incorporating said motion for mistrial, said motion for directed verdict and said request for special verdict and written findings of fact, also all challenges to jurors put by plaintiff's counsel, opening statement made by plaintiff's counsel and argument to the jury made by plaintiff's counsel, together with a record of all requests and objections made by defendant's counsel during said argument,

also a record of all formal offers of evidence made by counsel, also that portion of plaintiff's counsel's argument against defendant's motion for non-suit in which the plaintiff's knowledge of the construction of the No. 9 slingload is denied by plaintiff's counsel, and also that portion of plaintiff's counsel's argument against defendant's motion for a directed verdict in which the plaintiff's knowledge of the construction of the No. 9 slingload is affirmed by plaintiff's counsel, be made up and prepared, in accordance with the provisions of Section 953-a of the Code of Civil Procedure of the State of California.

[fol. 17] Dated March 7th, 1933.

Sawyer & Cluff, Attorneys for Defendant.

Receipt of a copy of the within Notice and Request for Transcript is hereby acknowledged this 7th day of March, 1933.

A. Don Duncan, Attorney for Plaintiff.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 18] In Superior Court of City and County of San Francisco

STATEMENT OF EVIDENCE

Monday, December 12th, 1932, 10 o'clock A. M.

(The above-entitled cause came on regularly for hearing before the above-entitled Court, plaintiff being personally present and represented by his counsel A. Don Duncan, Esq., and defendants being represented by Webster Street, Esq., and Daniel W. Evans, Esq., of counsel for defendants. A jury was thereupon duly empaneled to try the above-entitled cause, which thereupon proceeded to trial as follows:)

OPENING STATEMENT ON BEHALF OF PLAINTIFF BY A. DON DUNCAN

Mr. Duncan: May it please the Court, and ladies and gentlemen of the jury, this is an action brought by a seaman, Alfred Spencer, against the Beadle Steamship Company, Ltd., and George S. Beadle, for personal injuries sustained by him while he was a member of the crew of the Steamship Fort Bragg. The action is brought under the provisions of a Federal Statute known as the "Jones Act." * * * That as the plaintiff with his partner was trying to take the heavy sling underneath this sling load to have it taken out the lumber which had been landed in there, not piled, toppled [fol. 19] with him, and some of the lumber fell over with him, threw him down off this narrow shelf into the open hold; that he tried to catch himself, of course, and dragged some of the lumber in with him, but the hold was open, there it was yawning beneath him. * * *

ALFRED SPENCER, the plaintiff called as a witness in his own behalf, and having been first duly sworn, testified as follows: 78 13th Street, San Francisco, California.

Direct examination.

Mr. Duncan:

Q. Mr. Spencer, you are the plaintiff in this case?
A. Yes sir.
Q. And your vocation is seaman, is it?
A. Seaman.
Q. How long have you been engaged as a seaman?
A. I have been a seaman since 1908.
Q. Since 1908?
A. Yes.
Q. Do you know any other vocation at all?
A. I didn't get you. Any other employment?
Q. Well, I mean do you know—you don't know how to do anything else besides being a seaman?
A. No, no, that is all I know—seaman.
Q. You were employed on the Fort Bragg May 4th, 1931, weren't you?
[fol. 20] A. Yes.

Q. How long prior to that had you been employed on the Fort Bragg as a seaman?

A. About 40 days.

Q. Forty days before that?

A. Yes.

Q. You had made how many trips on the Fort Bragg prior to this trip?

A. That was the finish of the second trip.

Q. The finish of the second trip?

A. The second trip, yes.

* * * * * * *

The Court:

Q. Who did you speak to, in other words?

A. Well, I was—well, I joined the ship, you know—it is Captain Samuelson who is the commander of the ship, you know, but every pay day I got paid by young Beadle, not by Captain Samuelson.

Q. By George S. Beadle?

A. Yes.

Mr. Evans:

Q. By young Beadle. Do you know his initials?

A. No, I don't know his initials.

Q. Do you know in what capacity young Beadle was working with relation to that vessel?

A. Well, no.

[fol. 21] Q. You don't know?

A. I don't know. The only thing is when a pay day came we received a check of him, and it was signed by Beadle.

* * * * * * *

The Court:

Q. When did you start to work in and about the ship Fort Bragg, thirty days before the accident?

A. About forty.

Q. I say, was it about thirty days before the accident?

A. No, forty days before the accident.

Q. Forty days?

A. Yes.

Q. Where, San Francisco?

A. San Francisco.

Q. You were hired here?
A. Yes sir.
Q. Had you worked before for this Fort Bragg steamer in any capacity?
A. I had worked before for the same company on the Wilmington.
Q. How long before?
A. Well——
Q. Well, six months or a year before?
A. No, no. About three months before that.
Q. At Wilmington, California?
A. Yes.
[fol. 22] Q. What were you doing there?
A. The same kind of work.
Q. On the same ship?
A. No. I mean the same company on the Wilmington.
Q. Were you working on the same ship? Were you working on the same ship or another ship?
A. On another ship.
Q. Another ship of what company?
A. Of the Beadle Steamship Company.
Q. And were you doing the same kind of work?
A. Same kind of work.
Q. Then you were off for two or three months?
A. I was.
Q. Then you were engaged in San Francisco?
A. In San Francisco.
Q. By someone. And you went aboard the steamship Fort Bragg, is that it?
A. Yes, your Honor.
Q. Then you finally went with the ship to Vallejo, is that it?
A. We went up North.
Q. Did you finally go to Vallejo, California? Did you finally land at Vallejo, California?
A. Yes.
Q. And that is where the accident happened?
A. Yes, that is where the accident happened.

• • • • • • •

[fol. 23] Mr. Duncan:

Q. Mr. Spencer, you are an American citizen, are you?
A. Yes sir.

Q. But you were born where?
A. In Latvia—Riga.

The Court: Where is that?
Mr. Duncan: Riga. It used to be in Russia, but I understand there is a new republic there now called Latvia.

Q. And whatever education you had you had there—did you?
A. I had——
Q. In Latvia?
A. I had a public school.
Q. Public school?
A. Yes.
Q. Now, what has been your experience as a seaman?
A. My experience?
Q. Yes. What kind of—had you had any experience on similar schooners, coasters, prior to the Fort Bragg?
A. Yes, for the last eight years.
Q. The last eight years. And as a member of the crew of the vessels?
A. Yes.
Q. And as a member of the crew you generally had to assist in loading and unloading the vessel, didn't you?
A. Yes sir.
Q. At all times?
[fol. 24] A. All times.
Q. That is, sometimes the vessel was—you had some assistance from stevedores?
A. Yes.
Q. But you generally had to help, the seamen had to help?
A. Yes, the seamen had to help.
Q. Now, on May 4th, 1931, you were rated as a—what is known as an A. B. on the Fort Bragg?
A. Yes.
Q. That is abled bodied seaman, that is what that means, isn't it?
A. Yes.
Q. And did you ship for a voyage from here to——
A. To the Columbia River and back.

* * * * * * *

Q. Now, when you went north with the vessel to Columbia River District, did you load a cargo of lumber?

A. Yes.

Q. And just describe generally the appearance of the Fort Bragg as to the deck loads of lumber on it after she was fully loaded in the Columbia District?

A. Well, we had a load of timber in one place, and then we went to another place.

Q. Do you remember the names of those place?

A. No, I cannot remember the names of those places.

[fol. 25] Q. Well, some place in the Columbia River?

A. Some place in the Columbia River.

Q. Yes.

A. But we loaded timber in one place.

Q. Yes.

A. And we loaded lumber in another place. First we loaded with timber, and then after we loaded timber we went up to another place and loaded the lumber.

Q. Now, were these heavy timbers?

A. The timbers were heavy.

Q. About how big?

A. Well, they was something like 16 by 18.

Q. About 16 by 18?

A. Yes, about that.

Q. Well, you didn't measure them, of course?

A. I didn't measure them, no.

Q. Were they long?

A. They was long. They was the length of the ship.

Q. The length of the ship?

A. Yes, from past one tank up to the forward tank.

Q. By the way, do you know how long the Fort Bragg was?

A. Well, closer to 100 foot, but not the space for landing the lumber on the deck.

Q. Now, the Fort Bragg carried oil, too, didn't it?

A. Yes.

Q. Gasoline?

[fol. 26] A. Gasoline.

Q. And it had two big tanks on the deck, did it not?

A. On the deck. They had more than two tanks.

Q. More than two tanks?

A. More than two tanks.

The Court:

Q. Well, about how many?
A. Four.

Mr. Duncan: Four.
The Court: And how high were they, counsel, estimated?
Mr. Duncan: About how high—just a minute.
Mr. Evans: If the Court please, before that diagram is shown, we would like to object to it on the ground it purports to show the loading of the lumber on board, and we think that is something that probably the witnesses should——
The Court: Yes, I will pass upon that at recess time. Don't show it to the jury. Just ask how high were the tanks estimated.
Mr. Duncan: Well, take one at a time. The tank at the forward end of the vessel, about how high was there?

A. Well, them tanks is pretty near even, somethin 12 feet.

The Court:

Q. About 12 foot?
A. Well, I am not sure about it.
Q. No, about will do. Of course, you are not sure.

Mr. Duncan:

[fol. 27] Q. And that forward tank, was it square or round?
A. Square.
Q. It was square?
A. Square.
Q. And that was a steel tank?
A. Steel tank.
Q. And about how big was it, about what dimensions did it have?
A. Well, I couldn't tell you that.
Q. Can you form some estimate of it?

The Court:

Q. The side of the square was how long, 2 feet, 3 feet, 5 feet, 6 feet, 8 feet?
A. About 10 foot, at least, 10 foot in length.

The Court: It covered—it was a square, and what did it cover now, 10 foot of space in a square, or what?

A. Well, it was not even a square.
Q. It was not an even square?
A. I am not sure about that if it was even square.
Q. I see.

Mr. Duncan:

Q. Would you say it was about ten feet square, that is, 10 feet one way and 10 feet another way?
A. Yes. Well, I am——
Q. About that?
A. Yes.

[fol. 28] Q. And this forward tank was placed how far in front of the forward part of the hatch coaming around the hold?

A. Well, it was 3 foot, you know, from the forward part of the hatch.

Q. And then it was set right square on the deck there, wasn't it?

A. Well, it was set—not right on the deck, you know, but they had some kind of blocking underneath.

Q. Oh, they had some blocking underneath it?
A. Yes.

Q. So that including the blocking, about how high was the top of this tank from the deck level?

A. About 18 inches, 12 or 18 inches from the deck, you know, up to the tank, the blocking.

Q. In other words, the top of the tank, then, would be about 13½ or 14 feet from the deck?
A. Yes.

Q. Now, there was some space between the sides of this tank and the side of the vessel, wasn't there?
A. Yes.

Q. Then the rear—the after part of the vessel, were there other tanks?
A. No.
Q. There were no tanks in the back part of the vessel?
A. Oh, in the back part of the vessel?
Q. The after part?

[fol. 29] A. The after part. Yes. There was three.
Q. Three?
A. Yes.

Q. Was there one in the center, that is, corresponding to the one on the forward——

A. What?

Q. Was there one in the center?

A. In the center.

Q. I mean amidships, corresponding to the forward tank, the same position?

A. In the same position.

Q. And how big was that tank in the after part of the vessel?

A. Well, as much as I know it was the biggest tank on deck.

Q. The biggest one on deck?

A. The biggest one on deck.

Q. And how much of a space was there between that tank and the after part of the hatch?

A. The same thing as in the forward.

Q. About——

A. About——

Q. (Continuing) —12 inches?

A. About 3 feet.

Q. Then were the other two tanks in the after part of the vessel?

[fol. 30] A. Yes.

Q. And where were they with reference to the big tank in the back part?

A. They were farther back, and the middle tank was more sticking out to the forward—to the forward part of the hatch; I mean the forward part of the ship; and the after tanks was more back. They was smaller.

Q. I see.

A. They was about five or six feet back of the middle tank.

Q. But they were all about 13½ or 14 feet high, were they, from the deck?

A. Yes, they had an even height.

Q. Now, how much deck space did these heavy timbers take? How were they loaded on the ship? I mean how much space did they take, and how high was the deck load of heavy timbers?

A. Well, the deck load of heavy timbers was about 10 foot.

Q. About 8 feet?

A. About 10 foot from the deck.

Q. About 10 feet from the deck?
A. From the deck.
Q. High?
A. Yes.
Q. And then——

The Court:

[fol. 31] Q. Where were they, what part of the ship, what part of the deck?
A. Well, on the side—there was just from the tank to the bulwark of the ship.

Mr. Duncan:

Q. In other words, these heavy timbers were loaded in between the tanks and the side of the ship?
A. Between the tanks and the side of the ship.
Q. Were they?
A. Yes.
Q. And did they take up the whole side, both sides of the ship there, these heavy timbers?
A. Yes, both sides of the ship.
Q. They took up all of the deck practically?
A. All of the deck, only except that space from the tank and the hatch.
Q. Now, there was a space after the heavy timbers were loaded on both sides of the vessel between the heavy timbers and the hatch coaming, was there?
A. There was lumber, yes.

The Court: Estimated 3 foot, didn't he?
Mr. Duncan: No, your Honor, that is the space from the hatch cover to the side of the front tank. Now, I am asking him as to the space between the side of these heavy timbers loaded on top of the deck and the hatch coaming.
The Court: All right.
[fol. 32] Mr. Duncan: On the side of the ship.
The Court: I see.

Mr. Duncan:

Q. You say there was a little space there?
A. There was a little space left there.
Q. Now, how wide was that space, about?
A. About—up to the hatch coaming about 40 inches.

Q. About 40 inches?

A. About 40 inches.

Q. And the same space was on the other side of the hold, too?

A. Exactly.

Q. And how far did that space run?

A. That space run from one tank up to the other.

Q. In other words, the two steel tanks, the big ones, projected out beyond the square of the hatch, did they?

A. Yes.

Q. About 40 inches?

A. Yes, about 40 inches.

Q. And the heavy timbers loaded right up against the side of the tanks?

A. Yes.

Q. And that left this space between the heavy timbers and the hatch and between the two steel tanks on both sides of the hatch?

A. Yes.

[fol. 33] Q. Now, did you load anything in that little space there?

A. Yes, we loaded lumber.

Q. You loaded lumber?

A. We loaded lumber, yes.

Q. Do you remember where it was taken on?

A. Well, I am not sure, but I think it was West Port.

Q. Is that on the Columbia River?

A. That is on the Columbia River.

Q. And by whose orders was that lumber put in this space?

A. Well, by the Captain's order.

Q. By the Captain's orders?

A. Yes.

Q. And were you ordered to put this lumber in there, some of it?

A. Yes.

Q. And did you also have assistance from stevedores up in that West Port, or wherever this was?

A. West Port, yes.

* * * * * * *

Q. Now, was there any of this heavy timbers in this space here (indicating)?

A. No, because it was too long.

Q. It was too long to get in between?

A. Too long to get in.

[fol. 34] Q. Between these tanks here, was it?

A. Yes.

Q. Now, you have testified about some smaller lumber being put in there?

A. Yes, small lumber was put in there.

Q. That was taken on at West Port, you think?

A. I think it was—well, I am not sure, but I think it was West Port.

Q. And what kind of lumber was that?

A. Well, it was 2 by 3's or 2 by 4's, and 1 by 8's.

Q. And what length was it?

A. Well, some of them was—some of them reached out up to the middle of the hatch, and they came two short lengths in the forward.

Q. And two short lengths. Did you load any part of that lumber under the orders of the officers of the vessel?

A. Yes.

Q. What part did you put on there?

A. I put on the after part.

Q. The after part?

A. The after part of the hatch.

Q. But where were you working when you finally unloaded this lumber under the order of the officers at Vallejo?

A. On the forward hatch.

Q. On the forward part?

A. Yes.

[fol. 35] Q. In other words, you were working on lumber when you were unloading that you had not put on the vessel?

A. Yes.

Q. Did you know how the lumber on the forward part was loaded?

A. No.

Q. Who was that put on by?

A. That was put on by stevedores.

Q. Stevedores at West Port?

A. Yes.

Q. Will you just state how high that lumber was in that narrow space there?

A. Well, in that narrow space it was high about 12 foot.

Q. About 12 feet?
A. 12 feet.

The Court:

Q. From the deck?
A. From the deck going over the big timber. After we evened with the timber then we loaded lumber all over.

Mr. Duncan:

Q. In other words, you built up this space here to the top of the heavy timbers about 10 feet, and when you got even with that you loaded lumber all over the top?
A. Yes.
Q. How high was the entire deck load when you got all through?
[fol. 36] A. When we got all through about 14 or 15 feet high.
Q. Was it level with the top of those tanks?
A. No, it ran over the top of the tanks.
Q. It ran over the tanks?
A. It ran over the tanks.
Q. How did you put that lumber in at the after part there that you loaded?
A. Well, we had the hatches on. We went to load—the first load, you know, we stowed in.
Q. What does stowing mean?
A. It means we put piece by piece. When you get 12 inches high, that is, below the lumber, if it comes on the outer edge, you have to have 12 inches high and put some—some laths, 4 foot long, and you usually put them across at a distance of 3 foot, you know. Always one and then another so far, to bind the lumber.

The Court:

Q. It makes it more secure?
A. More secure. That is the proper way to work on lumber.

Mr. Duncan:

Q. Now, you say when you started to load this lumber that the hatch covers were on?
A. Were on, yes.
Q. And then how did you load the rest of the lumber?

Were you doing this under the orders of the mate or captain?

[fol. 37] A. We do everything under the order of the mate or the captain.

Q. How did you load the rest of the lumber where you loaded it?

A. When we loaded—well, we go by the orders of the mate and the captain—land them—we cannot disobey.

The Court:

Q. Land what?

A. Land the loads, your Honor, after we stowed them. It was getting higher up. Well, the mate says, "Go ahead and land them."

Q. What does that mean?

A. The way they pick up the whole load from the dock. They take them and land them all in a bunch. They don't stow them no more piece by piece.

Q. You are talking now of putting it in position or taking it off?

A. No, putting it in.

Mr. Street: We ask that that they obey orders be stricken out, your Honor.

The Court: Stricken out. The rest remains.

A. Landing the loads until we got to the top of the tank, and then we started to stow piece by piece again.

The Court:

Q. Up to the top of the tank?

A. No, until we got even with the timber.

[fol. 38] Q. I meant the top of the rest of the timber?

A. Yes. Then we start to put them piece by piece again.

Q. Like you did at the bottom?

A. Yes, like we did at the bottom.

Mr. Duncan:

Q. Now, maybe for the benefit of the jury you had better explain more the custom aboard ship with loading. This lumber came aboard in what is known as a sling, didn't it?

A. In a sling.

Q. In other words, you got one sling load at a time?

A. One sling load at a time.

Q. And a sling is simply part of the ship's tackle, a wire sling, or wire sling that goes around—heavy wire sling?
A. Yes.

Mr. Evans: If the Court please, I suggest the witness explain the method of loading.
The Court: Well, if there is no doubt about it, it is all right.
Mr. Street: Further, your question, Mr. Duncan, is a general question.
Mr. Duncan: Yes, just a general question.
Mr. Street: It covers all ships and all kinds of lumber.

The Court:

Q. Well, what kind of a sling was used to load this ship?
A. Well, the sling to load the ship——
[fol. 39] Q. What kind do they use, do you know?
A. Yes, I will describe it.
Q. Take your time.
A. That sling is about 12 foot long.
Q. Made out of what?
A. Steel wire, your Honor. It is about three-quarters of an inch thick. Well, then——
The Court: Do they put the lumber in that sling on shore?
A. Yes.
Q. Then they lock it?
A. Yes.
Q. Then they pull it out to the deck of the ship, hoist it?
A. Hoist it.
Q. Who takes the lumber out of the sling when it is on the deck of the ship, the men on the deck?
A. Yes, the men on deck.
Q. Piece by piece?
A. Well, that is the proper way, you know, to work on lumber.

Mr. Street: Just a moment.
The Court: Strike that out.

Q. Did you take it out piece by piece, or just dump the load?

A. No, from the start we took it piece by piece until when [fol. 40] we couldn't land no more load, you know.

Q. Yes.

A. We couldn't stow no more piece by piece. The mate says, "Go ahead and land them."

Q. When the lumber came in this—what do you call it?

A. Sling.

Q. And came on the ship or was lowered down to the point where you wanted to get hold of it, how did you take it out of the sling?

A. Just unhooked it.

Q. Did you take piece by piece?

A. Well, on the landed loads we didn't take piece by piece.

Q. What did you do?

A. Land the load and let the sling out.

Q. Leave the whole load there?

A. Yes.

Q. Then you distributed it?

A. Well, evened it out.

Q. Go ahead.

A. Well, after we was even with the timber, then we went all over the deck, loaded piece by piece. We didn't land no more loads.

Mr. Duncan:

Q. Mr. Spencer, would it—I will withdraw that.

Q. Now, then, you gave the—after this was filled, the en- [fol. 41] tire deck load on both sides, how far was it then from the edge of this smaller lumber to the side of the hold here, to the hatch coaming?

A. Well, about 7 or 8 inches.

Q. 7 or 8 inches?

A. Yes.

The Court: The space between you mean?

Mr. Duncan: Yes.

A. Between the empty hold and the pile of lumber.

The Court:

Q. Deck space of about 7 or 8 inches?

A. 7 or 8 inches.

Q. How long? As long as the hold?
A. As long as the hold.

Mr. Duncan:

Q. And that was in three lengths, you say?
A. In three lengths, one long length and two short lengths.
Q. Now, how big were those sling loads put in there?
A. Well, the longer ones was over 20 feet. I am sure about that, over 20 feet, over.
Q. And how wide were they?
A. Well, about 36 inches, no wider.
Q. About 36 inches?
A. About 36 inches.
Q. And how high was the sling load when it was landed, [fol. 42] that is, a landed sling load?
A. Well, they come like in a square, you know. Well, about 36 inches.
Q. About 36 inches?
A. About that.
Q. About 3 feet?
A. About that.

* * * * * * *

Mr. Duncan:

Q. When you came down with that loaded vessel from the North, where did you land first here in the Bay District?
A. Always we land at Pier 24.

The Court:

Q. In San Francisco?
A. Yes, the most of the time.

Mr. Duncan:

Q. Do you remember when you got in here prior to May 4th?
A. No. May 4th? We didn't get in on May 4th. It was May 2nd. Yes, May 2nd we was up in Vallejo unloading lumber already.
Q. May 2nd was Saturday?
A. Saturday.

Q. I see.
A. We finished with it at 3 o'clock.
Q. At Vallejo?
A. Yes.
[fol. 43] Q. When you got into Vallejo, then, Saturday afternoon or Friday——
A. No, we went Saturday morning in there already.
Q. Saturday morning in Vallejo?
A. Yes.
Q. Then what did you unload in Vallejo?
A. We had the shingles in the hold.
Q. You had shingles in the hold?
A. Yes. We unload the shingles in the hold, and everything out from the hold. Then there was some shingles left on deck.
Q. Do you mean the top of the deck load?
A. Yes.

Mr. Street: What day is he talking about?
Mr. Duncan: Saturday.
The Court: At Vallejo.

A. They was on deck. On deck was the remainder of the order of shingles.

Mr. Duncan:

Q. Do you mean you left it on deck Saturday? Do you mean you left it on deck Saturday, the remainder of the order of shingles?
A. No. Well, yes, we took the shingles out, and keep drawing on the remainder of the shingles, and we didn't unload all the shingles on Saturday. Some was left Monday morning.
Q. Now, when you—in other words, Saturday at Vallejo [fol. 44] you were unloading the top of this deck load, were you?
A. Saturday?
Q. Yes.
A. No.
Q. Were you unloading that, or were you unloading shingles?
A. We was unloading—we stopped work on that lumber, and some of those fellows was working on the shingles with us.

Mr. Street:

Q. Which lumber?
A. The deck load.

Mr. Duncan:

Q. But you did unload some of the cargo from the hold Saturday at Vallejo?
A. Yes.
Q. What time did you knock off Saturday?
A. 5 o'clock.
Q. Did you close this hold and put on the hatch covers?
A. No.
Q. I mean were you ordered to close it?
A. No.
Q. You don't do anything on board ship unless you are ordered to do it, do you?
A. Nothing.
Q. A seaman cannot do anything unless he is ordered?
A. Only under orders.
[fol. 45] Q. Then the hold was not closed?
A. It was not closed.
Q. How did you leave that open hold Saturday night at 5 o'clock?
A. Well, we stretched a life line around.
Q. You stretched a life line around where?
A. On the edge about 3 foot from the edge of the hatch.
Q. 3 foot from the edge of the hatch?
A. 3 or 4 feet from the edge of the deck load, see.
Q. Oh, 3 or 4 feet from the edge of the deck load?
A. Yes.
Q. On top of the deck load you put a life line around?
A. Yes.
Q. That was to protect anybody from falling into the open hold?
A. Yes, during the night coming on board.
Q. By the way, how old were you when this accident happened?
A. What.
Q. How old were you when this accident happened?
A. How old?
A. Yes.

A. Well, December 5th—just now ago—I was 41 years of age.

Q. December 5th, 1931?

A. Yes.

[fol. 46] Q. In other words, you were 40?

A. 40, yes.

Q. All right. Now, then, what happened Monday morning there?

A. Well, Monday morning——

Q. The day of this occurrence?

A. Well, the mate told us to work.

Q. Was that safety line removed from around there?

A. Yes, it had to be removed.

Q. Before you started any work?

A. Yes, before we started to work.

Q. Then what were you ordered to do?

A. Started to make loads up.

Q. Of what?

A. Of this here lumber.

Q. Do you mean—indicating the lumber on top of the deck load?

A. Yes, on top of the deck.

Q. That was clear above the heavy timbers?

A. Above the heavy timbers.

Q. By the way, about how high was this lighter lumber above the top of the heavy timber?

A. Well, I couldn't say exactly, maybe two feet. But no more than two feet.

Q. What time did you start to work?

A. Started to work at 8 o'clock.

[fol. 47] Q. At 8 o'clock?

A. At 8 o'clock.

Q. And then did you finally get this lumber, lighter lumber, off the top of the heavy timbers?

A. Yes.

Q. And you got down to the level of the heavy timbers and these smaller sling loads, did you?

A. Yes.

* * * * * * *

Mr. Duncan:

Q. Just what happened that morning?

A. Well, we went around—the mate turned us out in the

morning to work. Well, we started to work on the lumber, finished there and proceeded going down.

Q. Did he tell you to——

A. Certainly. That is his orders.

Q. And was the hold open?

A. The hold open.

Q. Was there any protest made against working right next to an open hold, up right above an open hold?

A. Yes.

* * * * * * *

Mr. Duncan:

Q. Did you make any objection?

A. I did not, but my partner did.

* * * * * * *

[fol. 48] Q. What was his name?

A. His name is William Paul.

Q. Did he speak to anybody?

A. He spoke to the mate.

Q. To you?

A. Well——

Q. He spoke to the mate?

A. He asked the mate, he says——

The Court: Well don't say that. Did he speak to the mate?

A. Yes.

Q. Well, if he spoke to the mate in his presence, I think that would be admissible.

Mr. Street: Well, that is all right, yes.

The Court:

Q. Well, what did he say to the mate, at that time and place?

A. He said, "Ain't we going to close the hatch?"

Q. He said, "Are you going to close the hatch"?

A. Yes.

Q. What did the mate say?

A. "Never mind."

* * * * * * *

Mr. Duncan:

Q. Now, how long would it have taken to have that hatch closed at that time?

[fol. 49] A. Between five or ten minutes. As long as ten minutes.

* * * * * * *

The Court:

Q. Where were you?

A. I was here on the port side.

Q. Forward, is that it?

A. Yes.

Q. Next to the hatch?

A. Next to the hatch.

Q. When you say you were there, do you mean you were on top of the lumber there, on top of the pile of lumber that was there?

A. On top of it.

Q. And where was Paul, your partner?

A. He was working the same place where I was.

Q. Point to the spot again where you were?

A. We was working right here when the accident happened. (Indicating.)

Q. Where did you do your piling?

A. What?

Q. You said yesterday you piled on the back?

A. Yes.

Q. Then you moved forward to where the other men had piled?

A. Oh, your Honor, I loaded the ship—load and unload in the forward.

[fol. 50] Q. You were unloading the fore part?

A. Unloading the fore part.

Q. At the time of the accident?

A. Yes.

Q. Who had loaded that fore part?

A. Stevedores.

Q. Not you?

A. Not me.

Q. Point to that fore part.

A. Here (indicating).

Q. And you were unloading that, were you?
A. Yes.
Q. You and Paul, your partner?
A. Yes.
Q. Is that when the accident happened?
A. That is when the accident happened.

* * * * * * *

Mr. Duncan:

Q. Mr. Spencer, before I ask you to describe your fall, will you just indicate what the condition of that hold was, that is, whether or not there was anything in the hold?
A. Yes.
Q. Just—can you illustrate that?

(Witness marks on diagram.)

Q. There was lumber across the bottom of the hold, was there?
A. Yes sir.

* * * * * * *

[fol. 51] Q. Lumber left in there?
A. Left in there.
Q. You had taken out some?
A. We had taken out some, you know.
Q. Yes.
A. Because the ship carried freight, too.
Q. She carried freight, too?
A. She carried freight in the hold.
Q. You had taken out freight from the hold?
A. We was taking out freight from the hold and shingles.
Q. Shingles?
A. In bundles, you know.
Q. That was Saturday you did that?
A. Yes.
Q. Had you got down to the lumber there in the bottom of the hold?
A. We got down to the lumber.
Q. When was this, Saturday?
A. That was Saturday.
Q. When you shut down Saturday?

A. We shut down with the hold on Saturday.
Q. I mean you shut down work?
A. Yes.
Q. Stopped work?
A. Yes.
Q. You didn't close the hold Saturday?
A. No, no. no.

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[fol. 52] Mr. Duncan:

Q. Then will you just tell the Court and jury what happened—and counsel—on this morning in question, and how it happened, and where it happened, in your own words?
A. Well, after we was through with the top of the lumber, we started to work from the inside, inside the timber on the hatch coaming.
Q. About what time did you start to work on that lumber on the inside——
A. Well, it was between 9 and 10.
Q. All right.

Mr. Street:

Q. You started to work between 9 and 10?
A. We started to work at 8 o'clock.
Q. That is what I thought.
A. Yes.

Mr. Duncan: And he says he started on the lumber next to the hatch coaming about 9 o'clock.
The Court: Point to it.

A. It was between 9 and 10 when we started on this here. (Indicating.)
The Court: All right.
A. We took the first two loads off. First—the first load went off this one here, and then the second one went off there. (Indicating.)
[fol. 53] Mr. Duncan:

Q. Now, these two loads you have just referred to were sling loads up about even with——

Mr. Street: Now, wait a minute. Ask him where they were.
Mr. Duncan: All right.

Q. Where were these two sling loads of lumber with reference to the top of the heavy timbers piled on the deck?

A. I cannot get you.

Q. Well, you have indicated two sling loads that you have taken off. I just want to place those with reference to the top of these heavy timbers. Were they sling loads that were about even with the top of the heavy timbers?

A. Yes, they was even with the top of the timbers. Well, we took off the first two loads. Then we went after the third load.

The Court: Point up there first.

A. And then we proceeded on the third load.

Q. Point to it.

A. Well, on the third load there. It was the second tier. (Indicating.)

Mr. Duncan:

Q. In the second tier?

A. In the second tier, yes.

Q. After you had taken off the two top sling loads, then you started on the next two sling loads underneath?

A. Underneath, yes.

[fol. 54] Mr. Street: Do I understand this correctly, that you took out the two first sling loads off one forward and one aft on the port side?

The Court: The two top tiers, and left the remaining tiers. Did you take off the two top tiers?

A. We took the two top tiers off.

Q. What did that leave, other tiers underneath?

A. Other tiers underneath, all right here now (indicating).

Q. Yes. You took off the two top tiers, and that left several tiers beneath?

A. Yes.

Mr. Street:

Q. What do you mean by tiers?

Mr. Duncan: Maybe I can make it clearer.

Q. Mr. Spencer, supposing you erase here what you have indicated as the loaded deck down to where you were work-

ing at the time you are describing now. Suppose you erase that for the time being. You testified you had already taken off this lumber (indicating)?

A. Yes.

Q. Well, erase that. And you testified you had taken off these two top sling loads here even with the top of the timbers?

A. Yes.

Q. So erase that top sling load for the time being so as to indicate at what point you had arrived here.

[fol. 55] Mr. Street: Well, when you do that, Mr. Duncan, please indicate the numbers of sling loads in some way so we will know what he is taking off.

Mr. Duncan: Yes. Will you do that, Mr. Spencer, please?

A. Well, that is what I explained.

The Court: As I understand it—maybe I am mistaken—when they put this lumber in the sling loads it was smaller lumber than the big timbers, and then it was placed in tiers or some position right here, wasn't it? (Indicating.)

A. Yes.

Q. It was piled up here in tiers, so to speak?

A. Yes.

Q. It was as high as this (indicating)?

A. Yes.

Q. Then you removed the top tier here and the top tier here, and another tier here and another tier there (indicating)?

A. Yes.

Q. That reduced it below that? (Indicating.)

A. Yes, it was below.

The Court: That is plain enough.

Mr. Street: No, he has testified they landed it in sling loads. They landed this lumber that he is taking off in sling loads.

The Court: Originally?

Mr. Street: Yes. Now, he has taken it off. I assume when he says tiers he means sling loads. Now, those sling [fol. 56] loads are separate.

The Court:

Q. When those sling loads were placed there in the sling, did the sailors or the men in charge, or whoever was there,

did they straighten them out in tiers, pile them certain ways, or just dump them in?

A. They just landed them.

Q. Never touched them?

A. Don't touch them.

Q. They just piled up as they came out of the sling load?

A. Yes.

Q. When you say tiers——

A. I call that a tier. This is one tier, this is second, and this is third. That is the way I mean (indicating).

Mr. Street: I don't think the Court and jury have the correct picture of this yet. You don't mind if I try to get this thing straight?

Mr. Duncan: It's all right. Go ahead.

Mr. Street:

Q. These sling loads, Mr. Spencer, come on deck already made up, don't they?

A. Yes.

The Court: Are they tied?

Mr. Street: Well, they are when they come on, but of course they take the slings off afterwards.

A. They take the slings off.

[fol. 57] Q. Those are what they call package lots, don't they?

A. They don't call them——

The Court: Are they tied together?

A. No, sir, they are all loose boards.

Q. Are they dumped right out of the sling loose as they are right into the place there?

A. Into the space there. (Indicating.)

Mr. Street: Well, you say dumped.

A. No, not dumped. Landed.

Mr. Street: I think the Court and jury got the wrong picture. That lumber is not picked up, is it, in a net?

A. No.

Q. It is all piled on the dock, isn't it, in lengths?

A. In lengths.

Q. Then they put a sling around it?

A. A sling around it.

Q. And then it comes on the deck, and they just lay it down there the way it came on board, and then they take the sling off?

A. Yes.

Q. Now, when you say tiers, I would like to have the witness indicate on this diagram where these separate sling loads are. Are those little marks supposed to be separate sling loads?

A. Separate sling loads.

The Court:

[fol. 58] Q. When they are taken out of the sling are they tied together?

A. No.

Q. Well, what makes them separate, after they are all put in one bundle there? They are piled on top of each other, aren't they?

A. 36 foot high and about 40——

Q. There is no division line between them?

Mr. Street: Yes, they put blocks under them, don't they?

A. You only put the block when you land the load.

Q. Yes.

A. You have to put, you know, some piece underneath.

The Court:

Q. Each time?

A. What binds them, secures them all.

Mr. Street: Sure.

The Court:

Q. Do you pile one on top of the other?

A. Well, in the proper way.

Q. I say, is that done? You take what is in the sling load and put a board underneath it on the deck, and then you put the sling load on. Then when the next sling load comes along you put another board there?

A. Yes, sir.

Q. That is what they call tiers?

A. Yes.

• • • • • • •

[fol. 59] Mr. Duncan:

Q. Will you just designate where you were working at the time you fell?

A. Well, I was working on the second tier here (indicating).

Q. On the second tier there?

A. Yes.

• • • • • • •

Mr. Duncan:

Q. Now, how high were you at that time above the hatch coaming?

A. Above the hatch coaming?

Q. Yes.

A. Above the hatch coaming about—between 5½ or 6 foot.

• • • • • • •

Mr. Duncan:

Q. Where was Paul standing?

A. On top of the load.

Q. He was on top of the No.—what you have designated No. 5 load?

A. No. 5 load.

Q. At which end?

A. On the forward end.

Q. Forward end?

A. Forward end.

Q. And what was he doing with reference to this pick-up sling?

[fol. 60] A. Well, he helped me to hook it on when the hook came down, you know. We had a pick-up sling behind the load, and then he done the hooking it, you know.

Q. He hooked the sling on the ship's tackle?

A. He was on the top and I was down below standing.

Q. You were standing on what you have numbered as No. 9 sling load?

A. No. 9 sling load.

• • • • • • •

Mr. Duncan:

Q. Now, go ahead, please, and explain about this?

A. Now, when we have the pick-up sling around this load here—that load was——

Mr. Street:

Q. That is No. 5 load?

A. No. 5.

Q. Which end did you have the pick-up sling around?

A. On the forward end. Well, I was standing on No. 9 load. My partner was standing on top. They hooked on the pick-up sling and give the order to raise. The load I was standing on looked to me good and solid, looked to me solid.

Mr. Duncan:

Q. No. 9 load?

A. No. 9 load. When they raise the load—and my partner had this end with the hook in his hand, and I——

Q. Did they swing that load out any?

[fol. 61] A. Just a little.

Q. Why did they have to do that?

A. Well, so you could get by, you know.

Q. In other words, you were right up against this heavy timber, and it had to be swung out?

A. Swung out a little bit.

Mr. Street:

Q. Did you use any peevee bar to get it out with?

A. I don't remember.

The Court: Let him tell his story. Go on.

A. My partner was standing and holding this end of the sling, because you have to hold on to that.

Mr. Street:

Q. Which end of the sling is that?

A. The end with the hook.

Q. And the loop, too?

A. And the loop, too, yes, sure. Well, I pushed the sling through.

Mr. Duncan:

Q. Through what?
A. Through the load.
Q. Underneath?
A. Yes.

Mr. Street:

Q. Who did?
A. Me. Pushed the end through this loop, so I could [fol. 62] get it out from the other side. I had my hand on the load, had my hand on the load like that, and I went—put my foot there and the other there, and went over to get the hook out, to get the loop out, pulled out. When I pulled—when I pulled this out from under the load, I put my foot over—I had to put my foot on the outer tier of the load.

Mr. Street:

Q. No. 9 load?
A. No. 9 load. When I wanted to pull that—I had ahold already, and then I pulled. The little strain on it—more weight when you pull that—when I started to pull with more weight, the outer tier gave way, shifted.

The Court:

Q. Then what?
A. Gave away, and I lost my balance.
Q. And what?
A. And down I went in the hold.
Q. To the bottom?
A. Yes, to the bottom.

Mr. Street:

Q. Did the whole tier give way?
A. Well, only one give way, and I had my hand on the top of the load. But that lumber was not enough to hold my weight. When I went down the lumber went with me.

Mr. Duncan:

Q. How much of the lumber?
[fol. 63] A. Well, I cannot recollect that.

The Court:

Q. More than one piece or a dozen?
A. Oh yes, about a dozen pieces anyway.

* * * * * * *

Mr. Duncan:

Q. You have had experience on lumber schooners, have you, Mr. Spencer?
A. Yes.
Q. And in taking care of sling loads of lumber?
A. Yes.

* * * * * * *

The Court:

Q. Did you ever work on a ship where they loaded timber on a lumber ship and also loaded boards and scantlings?
A. Yes.

* * * * * * *

The Court:

Q. Well, you worked as a seaman for seven or eight years piling lumber on lumber ships?
A. Yes, your Honor.

* * * * * * *

Mr. Duncan:

Q. Do you know whether or not this lumber on which you were working, getting out the sling loads, was loaded in there like that with laths every 12 inches? Do you know [fol. 64] that or not? The lumber that you were working getting out?
A. Well, of course, I could see by the unloading——

Mr. Street:

Q. See by what?
A. When we unload I could see the loads we was taking out, that they was landed.

* * * * * * *

The Court:

Q. I am asking for the definition of the word—"landed." What does "landed" mean?

A. Well, you take—landed means when you take a load from a dock.

Q. From a sling?

A. From a dock, ready-made loads.

Q. In a sling?

A. Yes, ready-made loads from a dock and land them on the boat, and don't pile them.

Mr. Duncan:

Q. That is a landed load?

A. That is a landed load.

* * * * * * *

Mr. Duncan:

Q. Now, let us see if you understand that, Mr. Spencer. Do you mean that there were cross boards every 12 inches?

A. No, no, not every 12 inches, because they was landed loads, they was not piled.

* * * * * * *

[fol. 65] Mr. Duncan:

Q. Now, I may as well get through with this lumber, if I can. Now, will you state again the construction, the general construction of this sling load No. 9, on which you were standing, in just as simple and direct terms as you can? The one on which you were standing when you fell?

A. Yes.

Q. That would be No. 9 on the diagram?

A. Yes. Well, that was the kind of lumber like this here (indicating).

Q. Now, when you say like this here, what are you referring to, the 2 by 3's or the 1 by 12's?

A. Well, it was a load—it was stowed lumber. I don't know if it was a load or stowed underneath. I don't know that. I mean piled or landed load. I don't know about that. But it was——

Q. Now, just what do you mean by stowed, exactly?

A. Well, stowed, you know, means put down piece by piece.

The Court:

Q. The same as piled?
A. Yes.
Q. Stowed and piled are the same?
A. Yes.
Q. And landed is different?
A. Yes.

* * * * * * *

[fol. 66] Mr. Duncan:

Q. If you had not obeyed the mate's orders to work there, could they have held up payment of your wages?

* * * * * * *

The Court:

Q. Is there a custom or practice?
A. The mate don't hold the wages back. It is the Captain. Well, if I quit on my own accord, he can hold back my money for three days.

Mr. Duncan:

Q. He could have?
A. Yes.
Q. And did you have any money?
A. Well, I had a whole pay day coming then.

The Court: Counsel wants to know if you were discharged for not obeying some order, then what?

A. Oh, if the mate discharged for disobeying orders, he has to pay me right away.

Mr. Duncan:

Q. Oh, if you get discharged for disobeying orders?
A. Yes.
Q. Could they have done it while you were in Vallejo?
A. Yes, he could have done that in Vallejo. It was up to him to pay me right away, if I would have disobeyed orders.

* * * * * * *

[fol. 67] Cross-examination.

* * * * * * *

Mr. Street:

Q. Then how do you know that this was a landed sling load?

A. Well, I could see it.

Q. You could see it?

A. Yes.

Q. When it was loaded?

A. Well, I could see when I unload.

Mr. Duncan: Just a minute, Mr. Street. Will you make plain what you mean by this? You say how do you know this was a landed sling load.

Mr. Street: I am talking about No. 9.

A. Oh, yes. I could see that it was stowed lumber, I mean that it was a landed load.

Q. You could see No. 9 was a landed load when?

A. When I looked over it.

Q. When?

A. Well, when I looked when I was working there.

Q. When, what day?

A. Well, May 4th.

* * * * * * *

Mr. Street:

Q. Now, you testified yesterday that you didn't know whether No. 9 was a landed load or a stowed load?

A. Well, it looked to me, though, like it was a landed load.

[fol. 68] Q. It looked to you like a landed load?

A. Yes.

Q. But you don't know?

A. Well, it looked to me, and that is all I know.

Q. You don't know, though, whether it was a landed load or not, do you?

A. Well, it looked like a landed load, because it was even butts.

* * * * * * *

Mr. Street:

Q. And she had cargo for Vallejo both in the hold and on deck?

A. Yes, she had.

Q. All right. Now, those hatch covers, Mr. Spencer, they don't appear in here yet, but who takes those hatch covers off?

A. The sailors.

Q. The sailors do it?

A. Yes.

Q. Did you help take the hatches off the ship on this trip when she got into Vallejo?

A. We didn't take them off in Vallejo.

Q. You took them off in San Francisco?

A. In San Francisco.

Q. And you helped them take them off in San Francisco?

A. Yes.

[fol. 69] Q. Where did you put them?

A. Half goes aft.

Q. Up in here (indicating)?

A. Half goes here and half goes there. (Indicating)

Q. And you helped take them off?

A. Yes.

* * * * * * *

The Court:

Q. Why did you fall at that time when you stepped? What happened?

A. Well, I don't remember what happened.

Q. Did the lumber stand firm there, or did it——

A. Well, the load was raised and I reached after the sling. There was another load up here, that was going over on this under load, and then I reached after the heavy sling, when I reached, off I went.

Q. Why?

A. Well, something—I wasn't solid underneath.

* * * * * * *

The Court:

Q. Yes.

A. Sometimes it isn't clear underneath, you know. Then you push through and see if it is clear, and push it through.

So when it was through I get up and I went and stepped with my foot and had my hand on the load and went over to reach that—to reach the sling, you know.

[fol. 70] Q. Yes.

A. And when I reached over, then it give away under me.

Q. Where did it give away?

A. Out there (indicating).

Q. On the port side?

A. Yes.

Q. Where was the hold?

A. Right here (indicating).

Q. Right here?

A. Yes.

Q. And you fell in the hold from that point?

A. I fell in the hold.

Mr. Street:

Q. Now, Mr. Spencer, as a matter of fact, it would be quite possible, wouldn't it, to stand here and take this sling like this and just pass it under like that and hand the end to your partner standing on top?

A. Well, it is all right, Mr. Street—if it would be possible I was working there and I would do it, but it wasn't possible. That is the only way I could get the sling under.

* * * * * * *

[fol. 71] WALTER PAUL, sworn as a witness for plaintiff, testified as follows:

* * * * * * *

Mr. Duncan:

Q. Now what were you and Mr. Spencer doing just before he fell, if he did fall?

A. Well, we were trying to put a sling on a load of lumber.

Q. Can you describe the position of that load that you were trying to put a sling under?

A. Well, we had already sent out the top tier and we were working on the second tier, and we had sent out the forward load on the second tier.

Q. You had sent out the forward load on the second tier?
A. Yes.
Q. By that do you mean lower layer?
A. Yes, layer or tier.
Q. Go ahead.
A. And we were working on that, that tier had three loads and we was working on the middle load.
Q. Yes. And just describe rather fully if you will, in your own words what you were doing and what Spencer was doing and what happened and how it happened.
A. Well, we had already put—we had put the pick-up sling underneath the forward end of the load, and the winch driver had lifted up the load. I was on the top of the load and Spencer was standing down below on the next tier. [fol. 72] And he was passing the sling up to me, to put in the middle of the load when he—when the lumber he was standing on—several pieces capsized—well, turned over under his foot, and he fell down the hold.

* * * * * * *

Mr. Duncan:

Q. Just go ahead.
A. And he was—he had almost got the sling underneath and was about to pass it to me when the lumber he was standing on turned under his foot and he fell into the hold.

* * * * * * *

The Court:

Well why not ask him: you saw where Spencer was when he dropped. How far was that to the top of the hatch covers if the hatch covers were in position?

* * * * * * *

The Court:

What is the answer, Mr. Witness?
A. Five or six feet.

* * * * * * *

Cross-examination.

* * * * * * *

Mr. Street:

Q. Oh, about this life line. The boat was lying in port on Sunday, wasn't she, over in Vallejo?

A. Yes.

Q. And on Sunday the men are off, are they not?

[fol. 73] A. Yes.

Q. There was no work done on Sunday on the boat?

A. No.

Q. But the sailors on this boat live on there, don't they?

A. Yes.

Q. That is their quarters?

A. Yes.

Q. And they come home at all hours of the night, don't they?

A. Yes.

Q. And naturally if they are off on Sunday they don't have to get back at five o'clock or four o'clock or anything like that. They come when they want to just as long as they are there on Monday morning?

A. Yes.

Q. Now that life line stretched around the open hatch is to keep them from falling in, isn't it?

A. Yes.

Q. Now they take that life line off when they start to work, don't they?

A. Yes.

Q. And what is the reason of that?

A. Well, you couldn't—it would be in the way of the work.

Q. Of course it would. In other words, every time you [fol. 74] came over with a slingload it would catch there, wouldn't it?

A. Yes.

The Court:

Q. The life line is only for protection walking on the deck, is that it?

A. Yes, sir.

Mr. Street:

Q. You testified on direct examination that no lumber was taken out of the hold that Monday at any time?

A. No, there was not.

Q. But there was lumber in the hold that was going to Vallejo, wasn't there?

A. Yes.

Q. And was there any fixed time when that was to come out, if you know?

A. No, there was no fixed time so far as I know.

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[fol. 75] GEORGE S. BEADLE, called as a witness on behalf of plaintiff under Section 2055 of the Code of Civil Procedure, and having been first duly sworn, testified as follows:

Cross-examination.

* * * * * * *

Mr. Duncan:

Q. Now, Mr. Spencer—you made out a check to him on May 4th, and then cancelled the signature and give him the cash for it when he was hurt, is that so?

A. Yes, sir.

Q. For his wages?

A. For his wages. And he signed the payroll.

Q. Yes.

* * * * * * *

[fol. 76] JOHN SAMUELSON, called as a witness on behalf of the defendant and, having been first duly sworn, testified as follows:

1205 Tenth Avenue, San Francisco, California.

Direct examination.

Mr. Street:

Q. Captain, I just want to ask you a few questions now, and I will state for the record that I intend to recall the

Captain later. Captain, were you the—or who was the Captain of the Fort Bragg in May, 1931?

A. I was, sir.

Q. You were the Captain. What was the Fort Bragg's length?

A. 188 feet and 5 inches.

* * * * * * *

Q. At that time, Captain, were there any timbers on board the ship?

A. Yes, sir.

Q. Will you tell us how long they were and how many?

A. They was 52 feet long, 100 pieces.

Q. And do you remember the size of those pieces?

A. 12 by 14.

* * * * * * *

Mr. Street:

Q. Did you see Mr. Spencer on the morning he fell?

A. Yes, sir.

[fol. 77] Q. When did you first see him?

The Court: Before he fell or after?

Mr. Street:

Q. Before?

A. A few minutes before—or after 8 o'clock.

Q. What?

A. A few minutes after eight o'clock.

Q. That is the first time you saw him was a few minutes after 8 o'clock?

A. Yes, sir.

Q. At that time what was Mr. Spencer doing?

A. Slinging lumber.

Mr. Duncan:

Q. Where?

Mr. Street:

Q. Whereabouts?

A. On top of the timbers.

Q. Now, what was Spencer doing when you saw him shortly after 8 o'clock?

A. He was first slinging two by threes from the deck, and then a load of 1 by 12's.

Q. Did you say anything to him?

A. Yes, sir.

Q. What?

* * * * * * *

Mr. Street:

[fol. 78] Q. What did you say to him?

A. I told him not to go inside of the load when he was putting the sling on, towards the hatch, on the side towards the hatch.

Q. Well, did you see him trying to do that?

A. Yes, sir.

* * * * * * *

Mr. Street:

Q. Now, Captain, when you looked down in the hold, where was Spencer?

A. He was in the port side of the forward end of the hatch in the hold.

Q. And how far aft of the forward coaming of the hatch was he?

A. He would be 4 or 5 feet. I wouldn't say because I didn't measure the distance.

Q. Well, what is your estimate?

A. Some 4 or 5 feet.

Q. And as you—did you stand and look over at him?

A. I was right on the edge of the deck load towards the hatch.

Q. What kind of lumber were you standing on?

A. 1 by 12.

* * * * * * *

Mr. Street:

Q. Now, Captain, as you stood and looked down at Spen-

[fol. 79] cer in the hold, did you stand on any lumber at all?

A. Yes.

Q. Now, what kind of lumber was it? Where was the lumber you were standing on?

A. It was between the timbers and the hatch.

The Court:

Q. At what point?

A. The port side forward..

Mr. Street:

Q. And did you stand on the very edge of that lumber?

A. Yes, sir.

The Court: I would ask him where he stood and not say if he stood on the very edge. It is leading. However, there is no objection. Proceed.

Mr. Street:

Q. Was the lumber under your feet 1 by 12's like those (indicating)?

A. Yes, sir.

Q. Oh, Captain, did you notice whether you were standing on a sling load or not?

A. Yes, sir.

Q. Were you standing on a sling load?

A. No, sir.

* * * * * * *

Mr. Street:

Q. Captain, what are pick-up hooks?

[fol. 80] A. A pick-up hook?

Q. Yes. What do they call those pieces of wire?

Mr. Duncan: Now, you ask him to describe what it was.

Mr. Street: Oh, all right. I am trying to get along here.

A. It is a wire hook. It is a stiff wire about—some of them about the size of a pencil. We use them on board the ship.

Q. What do they look like?

A. They bend by themselves when they get hold of a wire like that on both ends. You can use either end with a hook on like that. You use them to get underneath loads,

and then get a sling from the other side, put this wire into the eye of the sling and pull it from under.

Q. That is what they are used for?

A. That is what they are used for.

Q. Were there any such pick-up slings on the Fort Bragg on May 4th, 1931?

A. Slings or hooks?

Q. Pick-up hooks?

A. Yes, sir.

Q. Were there any at the forward part of the ship on the deck load?

A. We keep them both forward and aft.

* * * * * * *

[fol. 81] Mr. Street:

Q. Now, Captain, I am going to reframe that question. Suppose you have a deck load of lumber and it is stowed so that there are timbers running from the forward to the aft part of the ship on the outside of two tanks such as there were on the Fort Bragg. Are you familiar with that situation?

A. Yes, sir.

Q. Assume that the——

Mr. Duncan: You mean on the inside, don't you?

Mr. Street: No, they are on the outside of the tanks. Aren't the timbers stowed up against the outside of the tanks?

Mr. Duncan: Oh, yes.

Mr. Street:

Q. Those timbers were stowed up against the outside of the tanks, and the timbers are stowed 10 feet high. Assume that there is a space between the timbers and the hatch coaming which is loaded with lumber. We cannot specify what kind, can we?

Mr. Duncan: No.

Mr. Street: On your evidence. We don't know the kind of lumber it is. But assume that the sling load, at least, that is going to be taken out is about—the top of the sling load is about 3 feet below the top of the timbers. That is

correct, isn't it, from your evidence? Assume further that the sling load you are taking out is a sling load of 1 by 8's. Assume further, Captain, that the sling load you are to take out is about—now, here we come to another impasse, [fol. 82] because Mr. Spencer's testimony is that forward sling——

Mr. Duncan: Now, wait a minute. Suppose you don't state before this witness what his testimony was.

Mr. Street: Well, you are probably right. Assume, at least, Captain, that this sling load of lumber you are going to take out is up near the forward part of the ship between the timbers and the coaming, and that the space that you are working in there is about—3 feet to 40 inches—is that the testimony?

Mr. Duncan: About 3 feet.

Mr. Street: Yes, about 3 feet. Now, assume further, Captain, that the sling, the pick-up sling, is placed on the forward end of the load about 10 feet aft of the forward hatch coaming, and that the—in that position the gear, the fall that comes down from the booms, is in a position running from the fore part of the sling load you are going to take out—is running forward of that up on a slant, so that if you pull up—oh, and assume further now that there is something in the way underneath the sling load so that it is not possible at that time to loop the heavy cargo sling around the outside of the load. Now, under those facts, as I have stated, Captain, is there any way in which that sling load can be made fast with the cargo sling other than placing the loop from the inside part to the other side that sticks out over the coaming, over the hatch?

Mr. Duncan: I am going to object to that question first, [fol. 83] that this witness has not been qualified to testify on those customs of handling slings and sling loads aboard ship. He appears to be an officer of the vessel, but it doesn't appear that he is qualified to testify as an expert on picking up sling loads.

The Court: What about that, counsel?

Mr. Street: He has been on lumber schooners for thirty years.

The Court: Even so.

Mr. Street: All right.

Q. Have you ever worked as a sailor on lumber schooners?

A. Yes, sir.

Q. Have you ever worked cargo under those circumstances that I have described?

A. Yes.

Mr. Street: All right. What is your objection now?

Mr. Duncan: Well, unless I make an objection, you probably won't have any.

Mr. Street: All right, you can answer the question, then, Captain. Are there other ways, or is there another way to put the end of the cargo——

A. There are several other ways.

Q. Will you describe some of them, please?

A. Whenever——

Q. Oh, assume further, Captain, that the load that you are going to take out is 36 inches high?

[fol. 84] A. 36?

Q. Yes.

Mr. Duncan:

Q. And assume further there are two men working?

Mr. Street: Yes.

Q. Whenever the gear forward or aft leads away from the load we always take the opposite gear that leads towards the load to lift with.

Mr. Street:

Q. Now, what do you do, Captain, with the sling that is already attached?

A. Which one of the two?

Q. The pick-up sling now. How do you get rid of that? How do you get the other gear on there?

A. You can hook it right into the same gear, if you want to, in the shackle and lift with the after, and still have the forward gear at the same time.

Q. Now, under those circumstances, is it possible to block up the end of the load that is raised and then lower away on your winch and take that sling off?

A. Yes sir.

Q. And after you have done that is it possible to push that sling under further?

A. Yes sir.

Q. Now, if you do that, Captain, isn't it possible then to stand in front of that load and loop the end around?

[fol. 85] Mr. Duncan: Now, just a minute. I think these questions are quite leading and suggestive.

Mr. Street: Well, of course. He is an expert.

Mr. Duncan: That doesn't make any difference, I don't think.

The Court: I will allow the question. Read it.

(Question read.)

Mr. Street:

Q. What is the answer to that question?

A. Yes.

Q. He can do that?

A. Yes.

Q. And in doing so, Captain, does he have to step near the edge of the lumber underneath his feet?

A. No sir.

Q. Now, are there any other ways to get that sling around there?

A. Yes, there are several ways that is used at different times.

Q. Can you use the pick-up hook?

The Court: Do you mean under the same conditions?

Mr. Street: Yes, under these same conditions. Could you use the pick-up hook in this situation?

A. Yes.

Q. Well, now, remember you have got the timbers right up here (indicating)?

[fol. 86] A. Yes.

Q. How are they going to get any room in there to put that hook underneath there?

A. From the timbers—between the timbers and the load?

Q. Yes. Can they move that load out?

A. Yes.

Q. And what do they use to do that?

A. The man working tells the winch drivers to move the loads away from the timbers with the gear that he is working with; and he will swing the load out from the timbers in that position that the man can step right inside, if he wants to. Or then he lays over the load and sticks the sling under,

and the other man sticks the hook underneath and pulls it through.

Q. Captain, is it possible to slip the loop of the cargo sling under from the inside of the sling load and then reach over and get it on the outside?

A. Yes sir.

Q. Now, could that be done with a load that was 36 inches high, under the circumstances that I have described to you?

A. Yes sir.

* * * * * * * *

Cross-examination.

Mr. Duncan:

Q. Now, what did you testify to, Captain, that you told Spencer about sticking this sling?

[fol. 87] A. I told him not to go inside on the load.

Q. Told him not to go inside——

A. Yes——

Q. On the load?

A. Yes.

Q. Now, when did you tell him that, right after 8 o'clock?

A. Somewheres about—probably fifteen or twenty minutes after eight.

* * * * * * * *

Mr. Duncan:

Q. Now, what did you say to Spencer?

A. I told him not to go inside when he was moving the big sling around the load.

Q. Told him not to go inside?

A. Inside towards the hatch.

Q. Oh, towards the hatch?

A. Yes.

Q. When he was what?

A. Passing the big sling around.

Q. Passing the big sling around?

A. Yes.

Q. Around which way?

A. He had the pick-up sling from this end of the load. If I can show it to the jury?

Q. Well, just describe it in words.

[fol. 88] A. Well, he had the load in this position (indicating).

Q. Now, just a minute. Just describe it in words, will you please?

Mr. Street: Well, lead him, Mr. Duncan.

Mr. Duncan: Just describe it in the best words you can.

A. One end of the load was lifted up with the small sling.

Q. This end near the top of the timber?

A. This load we are talking about now was lifted with the pick-up sling.

Q. At which end?

A. Towards the forward with the forward gear.

Q. And was that a sling load that was right next to the forward tank, or was it one removed back?

A. It was next to the forward tank.

Q. Right up next to the forward tank?

A. Yes sir.

Q. All right, it was the one next to the forward tank at the top of this lumber that was placed in there between the timbers and the hold?

A. Yes sir.

Q. And the hold was open, was it?

A. Yes sir.

Q. Now, just what did you tell him?

A. I told him not to go on the inside.

Q. Told him not to go on the inside?

A. Yes.

[fol. 89] Q. And then what else did you say?

A. I told him it wasn't necessary to go inside of the hold to sling it.

Q. You told him it wasn't necessary to go inside of the load to sling it?

A. Yes sir.

Q. Now, what else did you say?

A. That is all I told him.

Q. That is all you told him?

A. Yes, and I showed him also that it wasn't necessary.

* * * * * * *

Mr. Duncan:

Q. Now, as I understand you, you told Spencer not to put the sling in from the inside edge, is that it?

A. Not to step inside of the load.
Q. Not to step inside——
A. Of the load.
Q. Of the load. Do you mean between the load and the hatch coaming?
A. Yes.
Q. Well, was there any place for him to step there?
A. Yes, there was. As he lifted the load up he tried to step on the very same piece——
Q. Will you keep your seat, Captain, please?
A. Yes. That is the inside. (Indicating)

Mr. Street: Let him illustrate what he means by inside. [fol. 90] You are evidently confused.

The Court:

Q. What does inside mean?
A. Towards the hatch.
Q. Between the hatch and what?
A. The very place where he lifted the load up from. He was trying to step on the very board. The load was over this board, and he tried to step on the same board.

* * * * * * *

[fol. 91] WILLIAM VARTNAW, called as a witness on behalf of the defendant, and having been first duly sworn, testified as follows:

Route 3, Box 185, Petaluma, California.

Direct examination.

Mr. Street:

Q. Mr. Vartnaw, were you ever employed on the steamer Fort Bragg?
A. Yes, I was.
Q. When were you on the Fort Bragg?
A. I was there from May 15th, 1930, until September 4th, 1932.
Q. What position did you have on the ship?
A. Chief mate.

Q. What were your duties on the Fort Bragg as Chief Mate?

A. Looking after discharging and unloading of the ship, and hiring the crew and discharging the crew.

* * * * * * *

Mr. Street:

Q. Now, Mr. Vartnaw, did you have charge—I will ask you first who had charge of loading the lumber on that ship?

A. I did.

Q. Did you make any notes at the time of what kind of lumber it was and where it was stowed?

[fol. 92] A. Yes, I did.

Q. Have you got those with you?

A. Yes, I have.

Q. Will you please take them out? (Witness produces documents.)

Q. Now, I will ask you where did the Fort Bragg go first up North?

A. Loading lumber.

Q. Yes.

A. Westport.

Q. What kind of lumber did you load there?

A. We load lath and shingles.

Q. And where did you put them?

A. We load 6,019 bundles of laths, about 2,000 bundles of shingles. Some of that laths was down in the hold and some on deck, and some shingles in the hold and some on deck.

Q. Now, Mr. Vartnaw, with reference to the port side of the ship, how high up were the laths piled on the deck?

A. They were just about even with the rail.

Q. And how high is the rail?

A. The rail is about 3½ or 4 feet.

Mr. Duncan: Which part of the deck on the port side are you referring to?

Mr. Street: I will come to that in just a minute.

Q. Mr. Vartnaw, I show you here—will you come up here, Mr. Duncan? I show you here what purports to be a diagram of the deck space between the forward tank and the [fol. 93] after tank, and which also shows the hatch and the rail?

A. Yes.

Q. Now, does this diagram here represent—without reference now to these figures that are on there—we don't care much about that now—but does this diagram here represent the situation around the hatch and between the tanks?

A. Yes, that looks like it.

Q. This is the way, then, that the——

A. Looking forward?

Q. Yes. Now, Captain, which side would the port side be on?

A. On the left hand side, this side. (Indicating.)

Q. Will you put a "P" there just out here on the margin? And on the other side would be the starboard side?

A. Yes, that would be the starboard side.

Q. I see. Now, Mr. Vartnaw, will you—if you will notice here the forward plank on this diagram comes out outboard on the port side and outboard on the starboard side further than the edge of the hatch?

A. Yes.

Q. Is that the way it was on the Fort Bragg?

A. It was.

Q. Now, with reference to this space between the rail on the port side and the edge of the hatch on the port side, were there any laths stored in there?

[fol. 94] A. Yes, this was all stowed——

Q. Now, you say this?

A. Yes.

Q. Will you draw an X on that diagram to show where the laths were?

A. All over right from forward to aft all along even with the rail. These little holes in between the tank were full of laths, too.

Q. Now, just fill in with a pencil there where those laths were. Just scribble on there and show where they were stowed?

A. They started right from there (indicating).

Q. You are indicating a point up there. Will you please mark that A. (Witness marks on diagram.) And all the way down here right up to this tank here. There was a tank off there, a little tank, and then between the tanks. (Indicating.)

Mr. Duncan: That is not on the diagram.

Mr. Street: Yes, here is the tank.

A. There was many tanks. We have seven tanks there, I think.

Mr. Duncan: Do you mean there is a tank that isn't shown on the diagram.

Mr. Street: Yes, there are tanks after the house.

A. It is all full of laths here, and in between here (indicating).

[fol. 95] Q. All right. Now, Mr. Vartnaw, you have testified that the laths were stowed on the port side. Now, Mr. Vartnaw, you have indicated that the laths were stowed on the port side from a point a little bit forward of the forward tank all over the deck back to the after part of the after tank?

A. Yes, and also between the tanks.

Q. And in between the tanks. Now, on the port side, were those laths stowed clear up to the hatch coaming?

A. Yes, even above the hatch coaming about 8 inches.

Q. I see. Now, to the best of your recollection, how high was the hatch coaming?

A. The hatch coaming is about 2 feet and a half.

Q. And the bundle of laths was up above that?

A. Yes, even with the rail.

Q. And did you stand there all the time and watch these men put that lath in there?

A. The second mate does, and I do, too. I gave my orders to him, and he is there all the time watching them, but I attend to on the dock and aboard ship.

Q. Did you say at Westport that these laths that you say were 6,000 were put on the deck?

A. Part—half of them was on the deck and half in the hold.

Q. But you saw yourself before you left Westport that they were stowed on the port side on the deck between the [fol. 96] rail and up to the coaming?

A. Yes, sir.

Q. And about a foot above the coaming, you say?

A. About a foot above the coaming, yes.

Q. I see. Now, what else did you load at Westport besides laths? Did you say shingles?

A. Yes.

Q. Do you know where those were stowed?

A. They was also put—some down in the hold and some on deck. Less on deck.

* * * * * * *

Mr. Street:

Q. Now, did you load anything else at Westport?
A. No.
Q. That is all you loaded at Westport?
A. Yes.
Q. Then where did you go?
A. Then we went to Clark & Wilson's Mill at Lynton.

Mr. Duncan:

Q. Lynton?
A. Oregon.

Mr. Street:

Q. Is Westport on the Columbia River?
A. Yes.
Q. And so is Lynton?
A. So is Lynton.
Q. Then you went up to *to* Lynton?
[fol. 97] A. Yes.
Q. Did you load lumber at Lynton?
A. Yes, 15,000 feet of flooring.
Q. And where did you put that?
A. Down in the hold aft, in the aft end of the ship.
Q. What else did you load there?
A. Nothing.
Q. Just the flooring?
A. Yes.
Q. After you left Lynton where did you go?
A. Then we went to Inman and Paulson's Mill.
Q. Did you take anything on there?
A. Yes.
Q. What did you take on there?
A. We took some kiln dried lumber, 25,000.
Q. Where did you put it?
A. In the hold forward. Then we took some rustic and put that in the hold forward, and we took some flooring and put that in the hold.

Mr. Duncan: Now, just a minute. We are not concerned with this.

Mr. Street: If you will let me go, we can get through sooner.

The Court: Oh, let him finish. Go on.

A. And some studding, 3,000 feet. That went in the hold forward, and also some timbers on the deck.

[fol. 98] Mr. Street:

Q. Some timbers on the deck?

A. Yes.

Q. Do you remember where the timbers were stowed?

A. Yes.

Q. Where were they stowed?

A. On deck alongside the tanks.

Q. Where did you go from Paulson's?

A. Then we went and load freight and finish up loading freight in Mercy Dock, Portland.

Q. Where did you go from Mercy Dock?

A. Then we sailed for Coos Bay.

Q. Now, as I get the picture, when you get to Coos Bay you have got the heavy timbers. Do you remember how many there were?

A. 100 pieces.

Q. More than 100?

A. 100.

Q. Oh, 100?

A. Yes.

Q. When you get to Coos Bay you have lath all over the deck of the ship on the port side up as high as the rail, and over to the coaming and about a foot above the coaming?

A. Yes.

Q. And on top of that, then, you have these timbers going up?

[fol. 99] A. Yes.

Q. And those timbers—did you say—were loaded up against the tanks?

A. Yes.

Q. And where were the timbers with reference to the outboard?

A. Right even with the rail. It go right from the rail straight up.

Q. And on top of the rail?

A. On top of the rail, yes.

Q. Now, when you got to Westport, what kind of lumber did you put on?

A. Coos Bay?

Q. Yes, pardon me. When you got to Coos Bay what kind of lumber did you put on, if any?

A. We took three orders of lumber there. First we took in 1 by 12. There was 21,000 on deck amidships.

Q. Yes.

A. And then we took one order of 2 by 3's, that was 15,000, and that went on deck on top of the timbers, and then we took an order of 2 by 3's and 1 by 12's mixed, 25,000, and that went on top of all of it. That is all.

Q. Now, Mr. Vartnaw—I wonder if we could have the other blackboard, your Honor?

The Court: Surely.

Mr. Street: Well, I will try to get along without it. It takes time.

[fol. 100] Q. Mr. Vartnaw, will you—first, when you started to load the 1 by 12's were the hatches on at Coos Bay?

A. Yes.

Q. They were. And when you loaded the 1 by 12's where did you land them?

A. We first land them on the hatch and then piled them in, into the side of the hatch. We had a space about 3 feet, or a little over 3 feet alongside of the hatch where the timbers can fit in. So we filled that space in with the 1 by 12's. We got that order in amidships.

Q. Will you just describe the manner in which—well, I will withdraw that.

Q. You say the 1 by 12's were landed on top of the hatch?

A. Yes, first.

Q. Then did they break up the loads?

A. Yes.

Q. And then you say they put them in between the coaming and the timbers?

A. Yes.

Q. And on top of the laths?

A. Yes.

Q. And did they stow them in there by hand?

A. Yes. First—well, we was low enough we could reach it by hand.

* * * * * * *

[fol. 101] Mr. Street:

Q. Did they put lath in there?
A. Between the lumber, yes.
Q. And how often did they put it in?
A. Every foot.
Q. About every foot?
A. Yes.

Q. And how high up above the top of the coaming—or above the top of the lath here did they stow that lumber by hand?

A. As high as we could conveniently reach, about 4 or 5 feet.

Q. So that in here you had all hand stowed lumber, did you?
A. Yes.
Q. All right. That is all of the hand stowed lumber.

(Marks on diagram.)

Q. Now, then, did you—now, where were the 2 by 3's landed?

A. 2 by 3's was stowed on top of the timbers.

Q. On top here (indicating)?
A. Yes.
Q. They were up there?
A. Yes.

Q. Now, then, did you land any loads of 1 by 12's without stowing them?

[fol. 102] A. Yes, we did.

Q. Where did you land those?
A. On top of those stowed 1 by 12's.

Q. And do you remember how many you put up there, just if you remember?

A. Two or three loads high. I don't remember just how high.

Q. You don't remember?
A. Two or three loads.

* * * * * * *

Mr. Street:

Q. Going to the scene of the accident, will you please tell the Court and jury where you were at the time Mr. Spencer fell?

A. I had just stepped over the rail on the starboard side at the moment when I seen Mr. Spencer fell.

Q. You say you saw him fall?

A. I saw him fall, yes.

The Court:

Q. Saw him fall, or while he was falling?

A. I seen him falling.

Q. Where was he when you saw him?

A. He was going down, just abreast of the hatch, and I stepped on board.

Q. You didn't see him on top of the lumber when he fell?

A. I didn't see him on top, no.

[fol. 103] Mr. Duncan:

Q. Where were you?

A. I just stepped over the rail. I was on the dock, and there was something there, and I was waiting for a load. I was loading the trucks on the dock. We load the trucks with our gear, and there was loads coming, so I stepped on board the ship just at the time he fell.

. . . . . .

Mr. Street:

Q. Now, you say you came aboard and were on the starboard side, and you saw Spencer falling. Was there anything going down in the hold with him?

Mr. Duncan: Just a minute. If he can see.

Mr. Street: Yes, I am asking him.

A. Yes, I seen a board, 1 by 12, going with him.

Q. How many?

A. One.

Q. Just one 1 by 12?

A. That is all I noticed.

Q. And what did you do after he fell in the hold?

A. I went down in the hold, too, to see if he was injured.

Q. Was there any loose lumber lying around in the hold?
A. Yes, that board that fell down.
Q. Just that one?
A. Yes.
[fol. 104] Q. Mr. Vartnaw, where had you been when you first went over to Vallejo—just a minute. Off the record.

(Discussion.)

Q. When the ship got down from up North, where did it go first?
A. Go to San Francisco, Pier 24.
Q. Where did it go from San Francisco?
A. We went to Vallejo.
Q. Now, on Monday morning the hatches were open or closed?
A. They were open.
Q. And was any—had that lumber which you said was in the hold, had it been taken out yet?
A. No.
Q. It was still in the hold?
A. Yes.
Q. Did you know when it was going to be taken out?
A. No, we didn't know that in advance.
Q. You don't know it in advance?
A. No.
Q. Mr. Vartnaw, is it the custom in lumber schooners that carry mixed lumber and cargo to leave their hatches open when they have cargo in the hold and a deck load of lumber on the deck? When they don't know where or when the—when they don't know when the cargo in the hold is going out?

Mr. Duncan: Just a minute.
[fol. 105] Mr. Street: I will withdraw that.

Q. Mr. Vartnaw, when a lumber schooner, such as the Fort Bragg—and I am referring now to the lumber schooners that carry lumber on deck and lumber in the hold, and also have cargo in the hold—is it the custom on that kind of a ship when they are in port with their gears rigged, and are taking lumber from the deck, and there is other lumber in the hold, that they don't know when it is going to come out, is it the custom, under those conditions, to leave the holds open?

Mr. Duncan: Just a minute. That is objected to on the ground it is immaterial and doesn't come within the circumstances of this case.

The Court: Well, the question is when they have lumber on the deck that they are unloading and they have lumber in the hold that is subject to call at any time the consignee calls for it, is it customary to leave the hatchway open pending the arrival or pending the appearance of the consignee who wishes the lumber delivered from the hold. That is substantially the question, isn't it?

Mr. Duncan: He doesn't say anything about a consignee. He just says when they don't know when the lumber in the hold is going out.

Mr. Street: Assume further that all the lumber on the Fort Bragg in this case was for one consignee.

The Court: Both on the deck and in the hold?

[fol. 106] Mr. Street: Yes. That is the evidence in the case, isn't it?

Mr. Duncan: So far.

Mr. Street: Well, all right.

A. It is not practical, because sometimes——

Q. It is not practical to put the hatches on?

A. To keep the hatches open, because they might want any part of that lumber.

The Court: It is not practical, or it is.

A. It is practical.

Q. It is practical to keep them open?

A. Yes, because they might want any of that lumber from the hold, and when we go hauling ship from Frisco to Vallejo—that is three hours, approximately—we make up all that lumber on the deck in sling loads and also in the hold at this time.

The Court:

Q. When you are in dock and you are not at sea, when you are in dock like you were at Vallejo on this occasion, is it the practice to keep that hold open?

A. Yes. Lots of times we have got the same order of lumber in the hold and on deck, so we keep the hatches open and take the lumber wherever we want.

Q. Were you unloading from the hatch this day?

A. That day we unloaded afternoon.

Q. I say, were you unloading from the hatch?

[fol. 107] A. That afternoon, but not in the morning.

Q. At the time of the accident, I mean?

A. No, we were unloading from the deck.

Q. That morning?

A. Yes.

Mr. Street:

Q. But you didn't know, Mr. Vartnaw, when you were apt to be called upon by the consignee to take that cargo out of the hold?

Mr. Duncan: We object to that as immaterial. The evidence is so far that there is only one consignee. These people were delivering his lumber from the deck, and apparently under the charge of the officers of the vessel, and whether or not they knew when this same consignee might call for some lumber out of the hold, plaintiff submits that is entirely immaterial.

The Court:

Q. Did you have any orders, Mr. Witness, regarding the hold load of lumber that day?

A. We did discharge some that afternoon.

Q. I say, did you have any orders regarding the discharging of that lumber from the Captain or from the consignee on that day? Do you know what the orders were regarding the lumber to be discharged from that ship?

A. We started from the deck first.

Q. What was your intention to do, to unload all the lum-

[fol. 108] ber at Vallejo?

A. Yes. We had some freight to Mare Island.

Q. Some at Vallejo and some at Mare Island?

A. Yes.

Mr. Street:

Q. How long did you unload lumber from the Fort Bragg at Vallejo that day, on Monday?

A. Until the water got high enough that we got out of there to go to Mare Island.

Q. And then you went to Mare Island. And what did you unload at Mare Island?

A. We unload the timbers and some flooring from the hold.

Q. Then did you come back to Vallejo?

A. Yes, then we came back and we discharged some shingles.

The Court:

Q. Was that in the morning?

A. That was afternoon.

Q. But you are speaking of the morning, counsel, aren't you?

Mr. Street: Well, my point is——

The Court: Well, in the morning did you attempt to unload from the hold, or did you have any orders to unload from the hold?

A. No, we didn't.

[fol. 109] Q. But in the afternoon you did unload from the hold?

A. Yes.

Mr. Street: Now, I think there is a question still left unanswered.

Q. You didn't know, did you, Mr. Vartnaw, in the morning when you were going to unload the lumber from the hold?

Mr. Duncan: That is the question we object to.

Mr. Street: I am asking him of his own knowledge.

Mr. Duncan: We object to it.

The Court: Well, I will sustain the objection. He can answer whether he had intention of unloading from the hold that morning, or any orders or intention to fill any such orders.

A. We did not have any orders in the morning, but——

Q. Did you have any intention of unloading?

A. Yes, we had intentions.

Mr. Street:

Q. Who do you get your orders from?

A. From Mr. Harrington, the Vallejo Lumber Company. He tells you if he wants something from the hold.

The Court:

Q. Did you have any orders from Mr. Harrington, or anybody else, to unload from the hold?

A. No.

Q. And you were not unloading from the hold?

A. No.

Q. But you were unloading in the afternoon from the hold?

[fol. 110] A. Yes.

The Court:

Q. Well, if you were unloading from the deck in the morning, but you had contemplated unloading from the hold in the afternoon, was it customary to keep the hatch open?

Mr. Street: That isn't the evidence. He doesn't know what they contemplated.

The Court: He says they unloaded from the hold in the afternoon.

Mr. Street: Yes, but that is a fact. He doesn't know what they intended to do.

The Court: Well, I want to find out, within his knowledge. Did you have any knowledge of the fact that they intended to unload in the afternoon from the hold?

A. No.

Q. Did you have any knowledge?

A. No, I didn't have any knowledge whether we should or not.

Q. When did you get the order to unload from the hold?

A. Whenever they need it.

Q. On that day when did you get the order to unload from the hold?

A. When we came back to Vallejo.

Q. You got the orders from Harrington & Company?

A. Yes.

Q. You were subject to any order that came?

[fol. 111] A. Any time.

Q. If you got an order in the morning to unload from the hold you would do so?

A. Yes.

The Court: Do you hear that, counsel?

Mr. Street: Yes, that is all the evidence I want.

The Court: He has made that plain now.

* * * * * * *

Cross-examination.

Mr. Duncan:

Q. As a matter of fact, Mr. Vartnaw, you have forgotten all about the stowage or the placing of this lumber on the deck load, I mean the details, until you referred to this little book when this case began to be worked up?

A. No, I didn't. That is an exceptional case, because we had those long timbers, and that is a different way of stowing those.

Q. A different way of stowing?

A. Yes.

Q. How do you usually stow them?

A. We usually stow them all at once, but at that time it was long timbers, and we couldn't put them between the tanks, and we had to leave a space for those timbers.

Q. What do you mean that you usually stow them all at once?

A. All the—all over the deck. But at that time we put [fol. 112] the shingles up on the tanks first, leaving about 52 feet for the length of the timbers in between.

* * * * * * *

Mr. Duncan:

Q. Now, how long is that space between the two steel tanks at each end of the hatch?

A. About 45 feet.

* * * * * * *

Mr. Duncan:

Q. Did you put the 1 by 12's a*d*mi-ships before you put any lumber on top of the timbers?

A. Yes, that was the first one that came in. First you want to put that in there to have more room, working on top with the smaller stuff.

Q. And you put 1 by 12's in there?

A. Yes.

Q. You piled those by hand, did you?

A. Piled as high as we could reach from the hatch, and then land the rest.

* * * * * * *

Mr. Duncan:

Q. Now, when you piled those in by hand up a ways, did you put laths every 12 inches?

A. Yes.

* * * * * * *

Redirect examination.

[fol. 113] Mr. Street:

Q. Now, as a matter of fact, isn't it the custom on a great many lumber schooners to carry lumber in what they call package lots?

A. Yes.

Q. In other words, they put the sling loads on the boat, and then they bind them with the lashings, and away they go?

A. Yes.

Q. Without ever hand-stowing them at all?

A. They are doing that right now on many steam schooners.

* * * * * * *

[fol. 114] August Kruse, called as a witness on behalf of the defendant, and having been first duly sworn, testified as follows: Hotel Harbor, San Francisco, California.

Direct examination.

Mr. Street:

Q. Mr. Kruse, what is your occupation?

A. Navigation Officer, Merchant Marine.

Q. Mr. Kruse, have you served as a sailor?

A. Yes, I did.

Q. How long?

A. I have been going twenty years altogether to sea.

Q. How many?

A. Twenty years.

Q. Have you ever served as a sailor or seaman on a lumber schooner?

A. Ten years.

Q. And do you hold any licenses at the present time?
A. As a Chief Mate.
Q. A Chief Mate's papers?
A. Yes sir.
Q. Were you ever an officer on board the Fort Bragg?
A. Yes, I was.
Q. How long were you an officer on the Fort Bragg?
A. Three months.
Q. Were you on the Fort Bragg in May, 1931?
A. Yes, I was.
[fol. 115] Q. Do you remember an accident that happened to Mr. Spencer?
A. I do.
Q. Were you on deck that morning?
A. I was.
Q. Where were you working?
A. I was working in the after gear, the after part of the No. 1 hatch.
Q. And where were you working?
A. Port side.
Q. And on the dock, or where?
A. On the deck.
Q. On the deck. First, I will ask you was there any cargo on the deck?
A. Yes, there was.
Q. What was it?
A. Lumber.
Q. Were there any timbers on the deck?
A. Yes, there was.
Q. And where with relation to the timbers were you working? Were you working on top of the timbers, or at one side of them?
A. I was working more one side of the timbers. I was working more on the lumber.
Q. On the morning—first, do you recall what time of day approximately it was, without having to give any hour, [fol. 116] or anything, can you remember whether it was in the morning or afternoon that Mr. Spencer was hurt?
A. I don't remember exactly. It was around 9 o'clock.
Q. I see. Now, did you go forward at all that morning?
A. I did.
Q. For what?
A. I went forward to get the sling for the lumber.

Q. And when you walked forward did you see Mr. Spencer?

A. I did.

Q. And where was he?

A. He was working on the lumber load that was slinged up, hanging in the cargo hook.

Q. Did you see the kind of lumber he was standing on?

A. 1 by 12's.

Q. And how were they stowed?

Mr. Duncan: At what time?

Mr. Street: At any time he saw him.

The Court: If he knows.

Mr. Street: Yes. How were those 1 by 12 pieces stowed?

Mr. Duncan: Yes, if he knows.

A. Some was stowed and some was landed.

Mr. Street:

Q. What kind of lumber was Mr. Spencer standing on?

Mr. Duncan: If he knows, if he ever observed.

Mr. Street: He is not going to testify to something he didn't know.

[fol. 117] A. The minute I saw him he was standing on 1 by 12's.

Q. And were those 1 by 12's stowed or landed?

A. They were stowed.

Q. Now, what was Mr. Spencer doing at the time you saw him when you walked forward?

A. I saw him taking the lumber sling——

The Court:

Q. Doing what?

A. Picking up the lumber sling.

Mr. Street:

Q. Do you mean the heavy sling, the cargo sling?

A. The heavy sling to put around the load that was hanging in the pick-up sling.

Q. Do you mean the sling load was hanging in the pick-up sling?

A. The load he was figuring to sling up was hanging in the pick-up sling.

Q. What kind of a load was that?

A. 1 by 12's.

Q. And was it stowed lumber?

A. That was a landed load.

Q. That was a landed load?

A. Yes, sir.

Q. Now, Mr. Kruse, were you on the ship when this 1 by 12 was loaded on to the ship?

A. I was.

[fol. 118] Q. What does a landed—what does a sling load look like?

A. Landed load?

Q. Yes, of 1 by 12's?

A. 1 by 12's—you mean difference between stowed and landed loads?

Q. No, I am not paying attention to that now. When the load is——

The Court: Placed in position?

Mr. Street (continuing): —slung on to the ship, how does the load itself look as to dimensions? Is it square on the end?

A. Not quite. One end is more even, and the other uneven.

Q. Now, were the 1 by 12's in the sling loads that were taken on board of this ship all of the same length?

A. No. Some shorter, some longer.

Q. Now, will you describe what you saw Mr. Spencer doing when he walked up forward to get the sling?

A. Yes, I saw him.

Mr. Duncan: I object to that on the ground no further foundation has been laid. Immaterial.

Mr. Street: I think I can connect that up with one question.

Q. How soon after—you didn't stay there, did you?

A. No, I did not. I walked aft again.

[fol. 119] Q. And how soon after you left here—or—well, I will withdraw that.

Q. Did you see Spencer fall?

A. I did.

Q. How long after you left the place where he was working on the sling loads did he fall?

A. A few seconds.

Mr. Street: Now, I think there is a connection.

The Court:

Q. Did you see him fall?
A. Yes, sir.
Q. You saw him fall?
A. I did.

The Court: Proceed.

Mr. Street: Now, will you read the question to which there was an objection?

(Question read.)

Mr. Street:

Q. First, did you see him as you were walking forward or as you were coming back?

A. When I was coming back, I saw him when I went forward and when I came back again.

Q. Now, when you came back again what was he doing?

A. He took the sling to sling——

The Court:

Q. He took what?

[fol. 120] A. The lumber sling, the wire sling.

Mr. Street:

Q. That isn't a pick-up sling?
A. No, that is the slinging-up sling.

The Court:

Q. Slinging-up sling?

Mr. Street:

Q. That is the heavy cargo sling?
A. That is the heavy lumber sling.

The Court:

Q. The second sling?
A. Yes, the second sling.

Mr. Street:

Q. What did he do with it?

A. And passed one end to his partner, and was figuring to walk around——

Mr. Duncan: Just a minute.

Mr. Street:

Q. Mr. Kruse, don't try to testify as to what you think Mr. Spencer was going to do. Just tell the Court what you actually saw him do.

A. That is what I saw him doing, pick up the sling——

The Court:

Q. He passed one end to his partner?

A. Yes, and he was hanging on to one end of the lumber sling.

Q. What do you mean by hanging on? He had it in his [fol. 121] hand, the other end?

A. Yes, your Honor.

Mr. Street:

Q. Which lumber was he hanging on to?

A. He was hanging on to the sling yet. He picked up the sling and passed one end of the sling to his partner.

The Court:

Q. And he was hanging on to the other end, is that it?

A. Yes, your Honor.

Q. Of the sling?

A. Yes, of the sling.

Q. He had it in his hand?

A. Keeping it in his hand, holding it in his hand.

Q. It was in his hand, the other end?

A. Yes sir.

Mr. Street:

Q. Did you say that he had one hand on the lumber?

A. Well, no, not during that time.

Q. Oh, I see. Now, what did you see him do?

A. When he started—he was walking closer to that load to get inside.

The Court:

Q. Walking or working?

A. Walking.

Q. He was walking closer. Go on. He was walking closer to what?

[fol. 122] A. Close to the load that was hanging on the pick-up sling.

Q. He was walking close to the load that was hanging in the pick-up sling, is that what you said, Mr. Witness?

A. Closer to the load.

Q. He was walking closer to the load that was hanging in the pick-up sling?

A. Yes.

Mr. Street:

Q. Where did he go?

A. Just—he was trying to get inside of the load.

Mr. Duncan: Just a minute. We object.

The Court: Don't say he was trying to get.

Mr. Street:

Q. Tell the Court and jury where he actually went, if you actually saw him go any place?

The Court: Just what you saw him do.

A. Inside of that load next to the hatches.

Q. Well, did he go in there?

A. The minute I saw him he was just on the end of the load, half ways inside of the load next to the hatches.

Mr. Street:

Q. Now, was the sling load raised up at that time?

A. The sling load was raised up endways with the pick-up sling.

Q. And where were Mr. Spencer's feet when you saw him?

[fol. 123] Mr. Duncan: If he noticed his feet.

A. He was standing on the stowed lumber what was underneath the load what was hanging in the hook.

Mr. Street:

Q. Now, where had he put his feet, if you saw him put his feet any place?

A. On the lumber what was underneath the load—stowed what was underneath of that load.

Q. But where did he put his feet with relation to the——

Mr. Duncan: Just a minute now. I object to this.

Mr. Street: Yes, I guess that is objectionable.

The Court: It is leading, yes.

Q. Where were his feet, if you saw his feet, at that time—that is a fair question.

Mr. Street:

Q. Where were his feet, if you saw his feet, at that time? Was he standing in the middle——

A. No, on the edge of the stowed lumber, next to the hatches—open hatches.

Q. And was he—were his feet in front of the load or underneath it?

A. Just even with the load.

Q. Now, did you see him do anything else?

A. He was putting that wire sling, lumber sling, underneath that load.

The Court:

[fol. 124] Q. That is the heavy sling, is it?

A. Heavy sling, yes.

Mr. Street:

Q. Did you say anything to him at that time?

A. I told him to be careful.

Q. Now, where were you when you saw him at that time, where were you standing?

A. I was standing on the deck load on top of the timbers that was covered with some lumber yet.

Q. On the timbers?

A. Yes, sir.

Q. Where did you go then?

A. I walked aft.

Q. Back to where you had been working?

A. Back where I was working.

Q. And what did you do then?

A. I just put the sling down, and I turned around to look again how they are making out.

Q. And what did you see?

A. And I saw him falling.

Q. At the time you saw him falling, could you see his feet?

A. No, I just saw his head and——

The Court:

Q. What position was he in when you saw him falling, was he in the air going down?

[fol. 125] A. He was in the hatches already. I happened to see his head and shoulders.

Q. You saw his head and his shoulders as he was decending into the hatch?

A. Disappearing, yes.

Q. You walked up aft, and when you looked again you saw him in the act of falling with his head and shoulders just above the hatch, and he was dropping into the hatch?

A. Yes sir.

Mr. Street:

Q. Did you see any lumber go down with him at all?

A. At the same time I saw one piece of lumber going down with him.

Q. What size was that?

A. 1 by 12's.

Q. Now, then, where did you go after you saw him fall?

A. I just went back there too.

Q. Back where?

A. To the place he was—where the load was hanging on the hook.

Q. Now, did you notice at that time in what position the fall was on the load that they were going to take out? Where was the pick-up sling?

A. The pick-up sling was under the load.

Q. And around the after end, or——

Mr. Duncan: Just a minute now. I think that is lead-
[fol. 126] ing, counsel.

Mr. Street: Well, I am trying to save time here, Mr. Duncan. I realize it is improper.

The Court: Well, don't ask leading questions.

Mr. Street:

Q. Which end of the load was the pick-up sling around?

The Court: Do you mean the strong one?
Mr. Street: No, I don't think that one ever got around, did it?

The Court:

Q. The pick-up sling was around which end of the load?
A. Forward end of the load.

Mr. Street:

Q. And where was the fall?
A. There was two falls, connected together in the chains, and there is a hook, what they call a cargo hook, that is connected together in that hook. There is a hook in it and chains, and two falls from each boom, they are connected into the two chains. They are always hanging down together.
Q. Well, were they on this morning?
A. That cargo hook was hooked into the pick-up sling.

The Court:

Q. At what time do you mean, counsel?

Mr. Street: We are going back now to the—I mean when you went back after the accident?
A. After the accident I went back. The load was hang-
[fol. 127] ing in the hook—the pick-up sling.
Q. And which way——

The Court:

Q. What hook?
A. Cargo hook.
Q. That is the strong hook?
A. That is the strong hook where the falls is connected.

Mr. Street:

Q. Well, is that attached to the falls?
A. The falls is connected in that hook.

The Court:

Q. Well, you say it was hanging in the hook. Do you mean it was in the strong sling, was it?

A. No, the lumber load was hanging——

Q. Was it in the heavy sling?

A. That was a small sling, pick-up sling.

Q. The load was hanging in the hook in the pick-up sling?

A. In the pick-up sling.

Q. And not in the heavy sling?

A. Not in the heavy sling.

Q. The heavy sling had not been placed around it?

A. Not yet.

Mr. Street:

Q. And was that sling load that was hanging there the [fol. 128] same one?

A. The same one.

Q. That Spencer was working on when you went forward?

A. Same one.

Q. Now, which way was the fall attached to the pick-up sling slanting?

A. The falls was leading more aft.

Q. Aft?

A. From the load.

Q. Aft from the load to the tops of the booms?

A. To the tops of the booms.

Q. Did you see Spencer in the hold when you got there?

A. I did.

Q. I will reframe that. When you went forward again where did you stand?

A. I stand on the lumber, on the 1 by 12's.

Q. Well, now, did you stand on top of the timbers?

Mr. Duncan: Just a minute. I object to that as leading.

The Court: Yes, that is a leading question.

Mr. Street: All right, I will withdraw it.

Q. Where were you standing when you looked down and saw Spencer?

A. I was standing on the lumber next to the open hatches.

The Court:

Q. At what time was this counsel?

Mr. Street: After Spencer had fallen in.

[fol. 129] The Court: After he came to the scene?

Mr. Street: Yes.

The Court: He had been a distance away. He had been aft and then came up and turned around and saw him falling, and then you came forward to the point?

A. Yes sir.

Q. Then you were standing at that time where, on the timber?

A. On the lumber.

Q. What lumber, counsel?

Mr. Street: He said the 1 by 12's.

The Court: Which one?

Mr. Street: I will try to get that in the record now.

Q. Where were you with relation to the open hatch?

A. I was next to the open hatch on top of the lumber.

Q. Yes, but were you aft or forward of the tanks, of the forward tanks?

A. I was aft from the forward tanks.

Q. And how far aft were you?

A. I didn't measure it, but it must have been about 10 feet or so.

Q. And do you know how far it was on the Fort Bragg between the forward tank and the forward hatch coaming, that little space in there?

A. That was about 5 feet.

Q. I see. Now, when you looked down and saw Spencer [fol. 130] where was he?

A. He was down in the hold.

Q. And did you see any lumber in the hold with him?

A. I saw one piece of 1 by 12's.

Q. And where was it lying?

A. Just a little foot from him.

* * * * * * *

Cross-examination.

Mr. Duncan:

Q. And Spencer, where was he standing?

A. He was standing on top of the stowed lumber, 1 by 12's.

* * * * * * *

Mr. Duncan:

Q. And his feet were underneath the load that he was taking out, is that so?

A. His feet was on the edge of the stowed lumber what was underneath the load what was hanging in the pick-up sling.

• • • • • • •

Mr. Duncan:

Q. Yes. But when it is piled, why, it is all fitted in, then?

A. Then it is all fitted in. That makes all level and even.

Q. And solid, isn't it?

A. And solid.

[fol. 131] Mr. Duncan:

Q. About what part of the hold was Mr. Spencer working at when you saw him, with reference to whether it was forward or aft or midships?

A. Forward.

Q. He was working forward?

A. The forward part of the hold.

Q. Very far forward?

A. A few feet from the forward hatch coaming.

• • • • • • •

Mr. Duncan:

Q. Now, then, this load that you saw him working on to take out must have been the forward load, then, wasn't it?

A. That was the forward load.

Q. The very first forward load?

A. First forward load.

• • • • • • •

Mr. Duncan:

Q. Well, you either remember or you don't. You don't remember whether there was another sling load between the one you say him working on and the tank?

Mr. Street: At what time Mr. Duncan?

A. At what time?

Mr. Duncan:

Q. At the time—the one you said you saw him working on just before he fell.

[fol. 132] A. That time there wasn't anything there any more.

* * * * * * *

Mr. Duncan:

Q. And how long were you gone—you said you went aft after you saw him putting the pick-up sling under this?

A. Yes.

Q. How long were you gone back aft before Spencer fell?

A. A few seconds.

Q. A few seconds?

A. Yes sir.

* * * * * * *

Mr. Duncan:

Q. Now, how far was it from where Spencer was standing to the top of the hatch coaming?

A. How high from the hatch coaming?

Q. From the top of the hatch coming?

A. That must have been about 4 or 5 feet.

Q. 4 or 5 feet?

A. Yes sir.

Q. Now, you say you saw Spencer going down into the hold?

A. I did.

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[fol. 133] IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

INSTRUCTIONS REQUESTED BY THE PLAINTIFF AND GIVEN BY THE COURT AS THE COURT'S INSTRUCTIONS

* * * * * * *

III

The plaintiff alleges in his complaint and has submitted some evidence on said allegations, that he was unloading a deck cargo of lumber and was working on the deck load,

close to the hold or hatch, when the lumber of the deck load, close to the hatch, toppled and precipitated him into the open hold or hatch, causing him injuries. The plaintiff alleges:

First: That his employer in charge of the vessel and in charge of the loading, negligently loaded the vessel with this deck cargo of lumber by negligently landing the lumber on the deck by reason of which it toppled, and plaintiff fell therefrom.

Second: Plaintiff alleges that the defendant negligently failed to secure said landed lumber by blocking or otherwise, to prevent shifting or toppling of the landed lumber.

Third: Plaintiff alleges that the defendant was negligent in leaving the hold open while plaintiff was working in the course of his duties to unload the deck cargo.

In other words, plaintiff alleges that the defendant negligently failed to furnish plaintiff with a reasonably safe place to work.

If you find that defendant did not provide plaintiff with [fol. 134] a reasonably safe place to work, then defendant was guilty of negligence, and plaintiff can recover judgment against defendant, providing you find also that said negligence was the proximate cause of plaintiff's injuries.

* * * * * * *

IX

You are instructed that the lumber on the deck next to an open hold upon which lumber plaintiff was standing when he fell, constituted the place furnished by the defendant employer for the prosecution of further work, and if you find that this lumber was built up on the deck next to an open hold under the orders of the defendant employer, or his agents, that is, the officers of the ship, and if you find that the plaintiff was ordered to work there, and if you find that such place of work as here described was not reasonably safe, you are instructed that it was negligence on the part of the defendant employer to furnish such a place to work, and such negligence, if any you find, is attributable directly to the defendant employer whether he or his officers on the vessel had actual knowledge of the danger or not.

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IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

INSTRUCTIONS GIVEN BY THE COURT OF ITS OWN MOTION

* * * * * * *

XVa

The law says the defendant must furnish a reasonably safe place for a seaman to work, meaning a reasonably safe place to work under all the circumstances of the business. [fol. 135] In order to determine whether defendant provided plaintiff with a reasonably safe place to work you must consider not one condition alone at the time and place, but the whole situation as presented by the evidence at the time of the accident.

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IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

INSTRUCTIONS REQUESTED BY THE DEFENDANT AND GIVEN BY THE COURT AS AMENDED

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II

If you find that the defendant(s) (have) [has] been negligent in some particular in connection with furnishing the plaintiff with a [reasonably] safe place to work, you are not warranted in returning a verdict for the plaintiff unless you find that the act of negligence on the part of the defendant was the cause of the plaintiff['s injury] (falling into the hold of the vessel. Even though the defendant may have been negligent in some particular, such negligence may be disregarded by you unless it caused the plaintiff to fall into the hold.)

(Portion in brackets added by the Court and portion in parenthesis stricken out by the court.)

Given as amended.

E. P. M., J.

* * * * * * *

[fol. 136] IN SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO

INSTRUCTIONS REQUESTED BY THE DEFENDANT AND REFUSED BY THE COURT

I

In every kind of work, and particularly in work upon ships, there are certain dangers inherent in the nature of the work itself, and certain other dangers which may arise during the progress of the work. If an employee is injured because of some danger which is ordinarily to be expected in the kind of work he is doing, he cannot recover from his employer, because he assumed the risk of such dangers when he entered the employment of the employer. If the danger or circumstance which causes the injuries to the employee is not an ordinary danger, i. e. is not a danger or circumstance ordinarily to be expected in the performance of the work, but is a danger or circumstance which arises when the work is being carried on in a careless and negligent manner, the employee also assumes the risk of injury from these extraordinary dangers, if they are obvious, apparent and known to him.

When the dangers or circumstances which cause the injuries are not ordinarily incident to the kind of work the employee is doing, he does not assume them unless they are actually known to him, but when the dangers or circumstances which cause the injuries are ordinarily incident to the employee's employment, he is presumed to know of such dangers whether he does or not, if he is a workman of mature years and experience.

[fol. 137] The plaintiff in this case is a seaman, and it is the general rule that seamen do not assume the risks of their employment when they are acting in obedience to orders. This exception in the case of seamen is made by the law because a seaman is ordinarily unable to disobey orders without incurring severe penalties; he is ordinarily liable to forfeit his wages if he quits before his term of employment is over, and he may also forfeit any personal effects he may leave on the ship in case he deserts. A seaman has been likened to a soldier on the field. Ordinarily it is impossible for him to exercise any will of his own without incurring certain penalties prescribed by federal statute.

Ordinarily he may be put in irons if he disobeys a lawful command.

If you find that the plaintiff knew before he commenced work on the morning he was injured, that the deck load of lumber had been landed in slingloads and if you further find that he was acting in obedience to general orders to unload the lumber, you need not consider the question of whether the plaintiff assumed the risk, if, at the time he received the order, he was unable to leave the ship and unable to disobey the command without incurring a penalty or forfeiture of his wages and personal effects, and punishment for disobedience of the order.

I further instruct you, however, that if you find that the Fort Bragg was tied to the dock at Vallejo when the plaintiff was ordered to help unload cargo, then the plaintiff was [fol. 138] not bound to obey such order and was not subject to any penalty or punishment for disobeying it, because such penalties and punishments as are provided by federal statute for disobedience of lawful commands apply only to lawful commands at sea; and if the Fort Bragg was not at sea when the command was given, the federal statute providing for punishment in such cases did not apply to this plaintiff. And I further instruct you that if the Fort Bragg was engaged in the coastwise trade only, it was unnecessary for the plaintiff to sign articles on the ship for any particular voyage, or for any fixed period of time. And if you find that the plaintiff's contract of employment was indefinite and not for any fixed or certain voyage, or that it could be terminated at will by either the plaintiff or the officers of the ship, then I instruct you, as a matter of law, that the plaintiff could leave his ship at any time she was in port without any forfeiture of his personal effects or of his wages earned up to the time he quit the vessel and without being liable to punishment for desertion. The federal statutes which provide for penalties and punishments in cases of desertion do not apply unless the seaman has engaged himself for a certain voyage or for a definite and fixed period of time.

The defendants in this case have interposed the defense that the plaintiff was injured by a risk which he assumed, and whether this defense is available to them or not depends upon your finding of what the status of the plaintiff was [fol. 139] when the command to unload was given. Whether

or not the plaintiff did assume the risk of the danger which caused his injury is a question of fact for you to determine, but you must first decide whether the plaintiff could have disobeyed the command to unload and quit the ship without forfeiture or penalty. You are further instructed, however, that the possibility or certainty of the plaintiff being discharged for refusal to obey an order can, as a matter of law, have no effect upon your conclusions.

Refused.

E. P. M., J.

II

If you find as a fact that the plaintiff assumed the risk of the particular danger which caused his injuries, he cannot recover anything in this action.

Refused.

E. P. M., J.

III

If you find that at the time the plaintiff was ordered to unload lumber from the Fort Bragg, he was a mature and experienced seaman and could have disobeyed the order and quit the ship without any forfeiture or punishment, other than the loss of his job, and if you further find that the injuries he received were caused by a danger which is ordinarily incident to the business of carrying deckloads of lumber on ships when that business is being conducted in a manner as prudent and careful as such a business can be carried on under all the circumstances, you must find that [fol. 140] the plaintiff assumed the risk of such danger and give judgment for the defendants.

Refused.

E. P. M., J.

IV

If you find that at the time the plaintiff was ordered to unload lumber from the Fort Bragg he was a mature and experienced seaman and could have disobeyed the order and quit the ship without forfeiture or punishment of any kind, other than the loss of his job, and if you further find that the defendants were negligent in stowing the deckload of lumber in slingloads on the deck without repiling each piece of lumber by hand, then if you further find that the danger of such slingloads collapsing if the workmen stepped

too close to the edge of the deckload was obvious and known to the plaintiff, you must find that the plaintiff assumed the risk of such danger and give judgment for the defendants.

Refused.

E. P. M., J.

V

If you find that the place in which the plaintiff was working was made unsafe because of changing conditions in the work, you must find that the defendants were not negligent in furnishing the plaintiff with a safe place to work because an employer is not bound to furnish his employees with a safe place to work when the conditions of the working place are constantly changing during the progress of his work.

Refused.

E. P. M., J.

[fol. 141]

VI

You are instructed that it is not negligence for the defendants to have the hatches of the Fort Bragg off while she is in port loading or discharging cargo from her hold.

Refused.

E. P. M., J.

VII

There is no duty on the part of the officers of a ship to stand over a seaman and direct him in the details of his work, and if you find that the plaintiff, in placing the sling wire underneath the slingload of lumber, was acting in response to general orders, I instruct you that the manner in which the sling wire was to be placed underneath the slingload was an act over which the plaintiff had the sole control, and if he chose to perform the act in a dangerous manner, such as stepping too near to the edge of the deckload when there was a safe method of doing the work, involving no risk of the edge of the deckload giving way, then the plaintiff cannot recover in this action.

Refused.

E. P. M., J.

VIII

If you find that the plaintiff, in placing the sling wire underneath the slingload, acted in pursuance to general orders but disregarded specific orders as to the precautions

he should take in doing the work and was injured because he disregarded such specific orders, the plaintiff cannot recover in this action.

Refused.

E. P. M., J.

[fol. 142]

IX

If you find that the plaintiff, on May 4th, 1931, could have disobeyed the order to unload cargo and could have quit the Fort Bragg without incurring any penalty or punishment other than the loss of his job, and if you further find that the work of unloading the lumber was being performed in a negligent and careless manner on May 4th, 1931, but in no different manner than was customary on the Fort Bragg, and if you further find that the plaintiff, prior to May 4th, 1931, knew of the negligent and careless manner of work customarily used on the Fort Bragg in unloading deckloads of lumber, and that he appreciated the risk that was attributable to such customary negligent and careless manner of work, and that he continued in his employment after such knowledge and appreciation, without obtaining from his employer, or his representatives, an assurance that the fault would be remedied, then I instruct you that the plaintiff assumed the risk resulting from such a manner of work, even though the risk arose out of the defendants' breach of duty.

Refused.

E. P. M., J.

X

If you find that the progress of the work the plaintiff was performing at the time of his injury was necessarily and constantly changing the physical condition of his place of work and that the cause of his fall into the hold was a condition created by said constant and continuous change in [fol. 143] the working place, then I instruct you that under such circumstances the employer, George S. Beadle, was not bound to furnish the plaintiff with a reasonably safe place to work at the time of the injury.

Refused.

E. P. M., J.

XI

If you find that the plaintiff in this action was of the class of seamen who are not subject to penalties or forfeiture for disobedience of orders, and that the ship was tied to the dock at Vallejo at the time of the injury, and that the plaintiff knew, or could, as an experienced seaman be deemed to know, the condition of the lumber beneath his feet and was upon notice of its actual condition, and if you find that he fell into the hold because he was pursuing a method of passing the loop of the heavy sling underneath the end of the slingload of lumber he and his partner were about to take out, and if you find that he could have performed this work in a safe manner not involving any risk of falling into the hold, then I instruct you that the plaintiff cannot recover in this action.

Refused.

E. P. M., J.

* * * * * * *

XIV

There can be but one proximate cause of an injury, and you are instructed that under the circumstances of this case the fact that the hatches were off at the time the plaintiff fell cannot be and is not the proximate cause of the [fol. 144] plaintiff's injuries.

Refused.

E. P. M., J.

XV

If you find as a fact that the plaintiff was standing on a slingload of lumber when he fell into the hold, and if you find that the plaintiff knew that slingloads furnished an insecure working place and knew that before he fell that he was standing upon such a slingload and as an experienced seaman appreciated the risk of working there, then the plaintiff assumed the risk of working in such a place and he cannot recover in this action.

Refused.

E. P. M., J.

XVI

You are instructed that it was not negligence as a matter of law for the defendant to carry lumber on the Fort Bragg in slingloads, and that if such a method of carrying lumber was sometimes followed on lumber schooners of the general type of the Fort Bragg, then the risk of working upon such a slingload was an ordinary risk of the plaintiff's employment as a seaman on a lumber schooner and any such risk was assumed by the plaintiff when he entered the employment and he cannot recover in this action.

Refused.

E. P. M., J.

XVII

If you find that the lumber on which the plaintiff was standing when he fell was hand stowed lumber, the plaintiff [fol. 145] cannot recover in this action.

Refused.

E. P. M., J.

* * * * * * *

XIX

If you find that the plaintiff helped remove the hatches on the Fort Bragg and knew that the hatches were off at the time he commenced work on Monday morning, May 4th, and that the absence of the hatch covers was obvious and apparent to him, then I instruct you that the plaintiff assumed the risk of any injury caused by the absence of such hatch covers.

Refused.

E. P. M., J.

XX

If you find as a fact that one of the boards in the deckload at the edge of the deckload turned under the plaintiff's foot when he stepped on it, and that this chain of circumstances caused him to fall into the hold, the plaintiff cannot recover in this action.

Refused.

E. P. M., J.

[fol. 146] In District Court of Appeal of the State of California, First Appellate District, Division One

1 Civil No. 9190

Opinion—Filed Dec. 28, 1934

Plaintiff, a seaman employed on the "Fort Bragg," a coastwise vessel, was injured aboard the ship while unloading part of a deckload of timber at Vallejo, California. He brought this action for damages against both defendants under the terms of the Jones Act (46 U. S. C. A. Sec. 688). At the trial a non-suit was granted as to the defendant Beadle Steamship Company, Ltd., a corporation, from which no appeal was taken, and it is consequently eliminated from the case. The jury returned a verdict against the defendant George S. Beadle for $10,000.00. Which the trial court reduced to $7,000.00 on motion for a new trial, and said defendant has appealed from the judgment.

The Amended Complaint alleged that respondent suffered numerous injuries of a serious nature through the negligence of appellant in failing to provide respondent with a reasonably safe place to work. The particulars in which appellant failed in this duty are alleged to be in piling slingloads of lumber on the deck next to the open hold of the vessel without piling or properly securing the lumber, and failing to provide safeguards around the open hold; that as a result of this negligence certain lumber gave way under respondent as he was attempting to fasten a loading sling under a slingload of this lumber precipi- [fol. 147] tating him into the hold, causing the injuries complained of. The Answer denied negligence, and set up as affirmative defenses, assumption of the risk by respondent and what is stated to be contributory negligence. It may be doubted that the plea of contributory negligence is sufficient, but no question is made on that point, and in any event under the Jones Act contributory negligence is not a defense, but may be considered only in mitigation of damages.

At the outset it may be well to state that we feel that the evidence was sufficient to go to the jury on the question of appellant's negligence, and is sufficient to sustain the verdict on that point.

As heretofore noted, appellant pleaded as an affirmative defense assumption of the risk, and requested the Court to give instructions on that question. This, the Court, however refused to do, apparently on the theory that such defense was not open to appellant in a case of this character. For this error we feel that the judgment must be reversed for the reasons hereinafter set forth.

The Jones Act, by reference, incorporates the Federal Liability Act (45 U. S. C. A. Sec. 51-59). The Federal Liability Act eliminates the doctrine of assumption of the risk as a defense in cases where the employer has violated a statute enacted for the safety of employees; otherwise it remains. 45 U. S. C. A. Sec. 54; Seaboard Air Line Ry. [fol. 148] vs. Horton, 233 U. S. 492; 58 L. Ed. 1062.

The common law doctrine, however, is limited and risks of the employment due to the employer's negligence are not assumed unless the employee becomes aware of the defect or disrepair and of the risk arising from it unless the defect and risk alike are so obvious that an ordinarily prudent person under the circumstanes would have observed and appreciated them. Seaboard Air Line Ry. v. Horton, 233 U. S. 492; 58 L. Ed. 1062; Southern Railway Co. v. Hermans, 44 Fed. (2d) 366.

The Horton case, it is true, was a railroad case under the Federal Liability Act, but that act is a part of the Jones Act as we have already seen. The Hermans case was, however, a case brought under the Jones Act, and the issue there was whether the employer had provided the employee with a reasonably safe place to work. It may be noted that in construing these statutes, the Federal Liability Act and the Jones Act, the state courts are required to adopt the construction placed on them by the federal courts. Pryor v. Williams, 254 U. S. 43; 65 L. Ed. 120.

We are therefore satisfied that the doctrine of assumption of the risk is applicable in a limited manner to cases of injuries to seamen when the action is brought under the Jones Act in the state courts, and it remains only to be seen if there was any evidence in the case to justify instructing the jury on that issue.

The ship's hold was open, which fact was admittedly [fol. 149] known to appellant; the lumber on which he was working was so close to the open hold that if he fell he would almost certainly fall down into it, and he also knew

that no safety lines or other safeguards were present to prevent him falling into the hold should he slip from his place of work. There was evidence also that he knew that the lumber he was working on was landed in slingloads and not piled, and was not as secure as piled lumber. There was also some evidence, although contradicted that respondent disobeyed specific orders in doing his work in the manner he was pursuing at the time of his injury. Respondent was an experienced seaman, who had made other voyages on the Fort Bragg and other lumber vessels. Under such circumstances appellant was entitled to have the jury instructed on the theory of assumption of the risk, and the court's refusal to do so was reversible error. Pryor v. Williams, supra; Southern Railway Co. v. Hermans, supra; Holy Cross Gold Min. Co. et al., v. O'Sullivan, 27 Colo. 237, 60 Pac. 570.

Respondent cites the following cases from California claiming that assumption of the risk does not apply. They are Anderson v. Matson Nav. Co., 125 C. A. 447; Lejeune v. General Petroleum Corporation, 128 C. A. 404; and McGeorge v. Chas. Nelson Co., 107 C. A. 148. In the first two cases the injury resulted from the negligence of a fellow servant, which defense is excluded under the Federal Liability Act, Chicago R. I. & P. Co. v. Ward, 252 U. S. 18; 64 L. Ed. 430.

In the McGeorge case the injured man was an assistant [fol. 150] engineer who had been ordered to adjust a bolt using a cold chisel, while a fellow employee struck the end with a heavy hammer. After several strokes the hammer missed the bolt and struck the plaintiff in the head and face. Clearly this was negligence of a fellow servant, and also there was the failure of the employer to furnish proper appliances, since there was evidence that there was on the vessel, which was at sea, no wrench of the proper size to turn the bolt. The Court recognizes that under proper circumstances the doctrine of assumption of the risk applies to seamen but not under the particular facts. Furthermore, the instructions given were too broad. We are of the opinion that that case is clearly distinguishable under the facts.

Many other errors are claimed by the appellant, but as they are not apt to occur on another trial, it is not necessary to refer to them. In passing, we may say that Instruction No. IX is erroneous in using the words "built

up"; as one of the issues was whether respondent had slipped on lumber that had not been piled, or lumber that had been piled as respondent claimed it should have been, and the quoted words are general enough to include both types.

For the reasons given the judgment must be and is reversed.

Thomas D. Johnston, Justice Pro Tem.

We concur: Tyler, P. J. Cashin, J.

[fol. 151] IN SUPREME COURT OF CALIFORNIA

In Bank

S. F. No. 15,384

OPINION—Filed Sep. 3, 1935

The plaintiff brought this action under the provisions of section 33 of the Merchant Marine Act of 1920 (46 U. S. C. A. sec. 688), called the Jones Act, against Beadle Steamship Co., Ltd., and George S. Beadle, for damages for personal injuries sustained when he fell through an open hold of the steamer Fort Bragg. A judgment of nonsuit was entered as to the steamship company. The jury returned a verdict for the plaintiff in the sum of $10,000 which, on denying the motion for a new trial, the court reduced to $7,000. From the judgment entered on the verdict the defendant, George S. Beadle, has appealed.

The main contention on the appeal is that the court erred prejudicially in refusing to instruct the jury on the question of assumption of risk. The Fort Bragg was a single-ended vessel engaged in the coastwise trade. The plaintiff was employed as a seaman on the vessel. On the particular voyage in question timbers 52 feet long were piled lengthwise of the deck, on the port and starboard sides, to a height of about ten feet above the deck. Between this lumber and the hatchcoamings there was a space about forty inches wide, and about forty-five feet in length, the forty-[fol. 152] five feet being the distance between two large tanks fore and aft of the hatch. At Coos Bay a quantity of

1 x 12's and 2 x 3's was loaded into the spaces so left on the port and starboard sides of the hatch and between the two tanks, up to the top of the long timbers. No space was left between the load and the hatch coamings.

When the ship docked at Vallejo to take off cargo the plaintiff was ordered to assist in unloading the lumber piled between the large timbers and tanks and the hatch coamings. While this lumber was being unloaded the hatch covers were off. The plaintiff and another were preparing a load of lumber to be swung ashore, about six or eight feet above the hatch coamings. While the plaintiff was attempting to place a cargo sling around a sling load of lumber, he fell into the hold, a distance of about eighteen feet, and was seriously injured.

The plaintiff alleged the defendant's negligence in the manner of loading the lumber between the long timbers and the hatch coamings, and the negligent failure of the defendants in furnishing to the plaintiff a reasonably safe place to work. The defendants pleaded affirmatively assumption of risk and contributory negligence.

The trial court refused to give the instructions requested by the defendant on the question of assumption of risk. The question is whether under the facts this defense was available to the defendant and the failure to instruct the jury thereon constituted prejudicial error.

[fol. 153] It is contended that the plaintiff, an experienced seaman, assumed any risk incident to the work of unloading under the circumstances involved. The Jones Act incorporates by reference the provisions of the Federal Employers Liability Act (45 U. S. C. A. sec. 54.). By the provisions of the latter act the defense of assumption of risk, if applicable under the facts, is a bar to recovery. The appellant contends that if that defense is not available in the case of a seaman suing under the Jones Act, nevertheless the plaintiff is not a seaman but is rather in the class of longshoremen and stevedores who live on shore and are not subject to the discipline of the ship and may quit at will. This argument is predicated on the showing that the vessel was engaged only in the coastwise trade, and was never any great distance from a port, and that the plaintiff was not under any necessity of subjecting himself to unsafe employment, but could quit at will. The cases relied upon by the defendant, however, do not indicate that the mere engagement in

coastwise trade alone is sufficient to create the exception. In such cases as Skolar v. Lehigh Valley R. Co., 60 Fed. (2d) 893, The Scandinavia, 156 Fed. 403, (see also Scheffler v. Moran Towing & Trans. Co., 68 Fed. (2d) 11), the plaintiff lived on shore and otherwise was not strictly a seaman subject to orders and discipline as such. We think the rule of those cases was not intended to be extended to the case of a seaman simply because he was employed on a vessel which touched ports frequently.

[fol. 154] We may assume that the plaintiff, as is stated in some cases (Chamberlin & Co. v. Rylander, 68 Fed. (2d) 362; Scheffler v. Moran Towing & Trans. Co., supra; States S. S. Co. vs. Berglann, 41 Fed. (2d) 456), assumed the risks ordinarily incident to the employment. One of the principal issues upon which evidence was introduced in this case was whether the plaintiff was furnished a reasonably safe place to work while unloading the lumber next to the hatch coamings. The accident occurred at nine o'clock on the morning of May 4, 1931. The hatch covers had been taken off the night before. There was undisputed evidence that the lumber, at least from a distance of about four feet from the deck, had been "landed" rather than stowed, that is, placed in sling-loads just as it came from the dock, rather than hand piled piece by piece with laths at stated distances to make a solid packing, and that a portion of the landed lumber toppled with the plaintiff causing him to fall into the hold. It further appeared that a request had been made to replace the hatch covers, but that the plaintiff was ordered to work with the hatch uncovered. It was undisputed that there was no necessity for the hatch to be open, as no unloading from the hold was being done that morning. There was also evidence that it was unusual to load the deck so close to the hatch.

The question is not whether the plaintiff properly handled the slingload which he was preparing to be lifted off. That question is rather one of contributory negligence, (see [fol. 155] Seaboard Air Line v. Horton, 233 U. S. 492, 503; McMyler Mfg. Co. vs. Mehnke, 209 F. Ed. 5; Devaney v. Atchison etc. R. Co., 86 Cal. Dec. 645; Engfors v. Nelson S. S. Co., 280 Pac. 337; Barker v. Kansas City, M. & O. Ry. Co., 88 Kan. 767, 129 Pac. 1151), and is not otherwise involved in a consideration of the matter before us. The important issue was whether the plaintiff was furnished a rea-

sonably safe place to work and whether there was evidence that the defendant was negligent in failing to provide such a reasonably safe place. The question was submitted to the jury on that basis, and we see no prejudicial error in the refusal of the court specifically to instruct the jury as to whether the plaintiff had assumed the risk. The effect of the instructions as given was to place liability on the defendant only if a reasonably safe place was not provided, and there was negligence in failing to make such provision.

It has become well-recognized, both before and since the incorporation into the Jones Act of the Federal Employers Liability Act, that the entire doctrine of assumption of risk is not applicable to seamen. The reasons underlying this policy are stated in the cases recognizing the exception. (Lafourche Packet Co. vs. Henderson, 94 Fed. 871; The Colusa, 248 Fed. 21; Cricket S. S. Co. vs. Parry, 263 Fed. 523; Ziegler v. Alaska Portland Packers' Assn., 296 Pac. 38; LeJeune v. General Pet. Corp., 128 Cal. App. 404; 56 Corp. Jur. 1198, et seq.; McGeorge v. Charles Nelson Co., 107 Cal. [fol. 156] App. 148.) It is also well settled that under the federal statu-es an employee does not assume the risk of the defendant's negligent failure to provide a safe place to work. (Seaboard Air Line v. Horton, supra; States S. S. Co. vs. Berglann, supra; Ziegler v. Alaska Portland Packers Assn., supra; The Kongosan Maru, 282 Fed, 666; Engfors v. Nelson S. S. Co., supra.) The rule of assumption of risk presupposes that the employer has performed the duty of caution, care and vigilance which the law casts upon him. (Cincinnati, M. O. & T. P. Ry. Co. v. Hall, 243 Fed. 76, 81). The reliance upon the statement in The Gladiolus, 21 Fed. 417, that leaving open a common between-deck hatchway while the vessel is lying in port is not presumptive evidence of negligence, is insufficient to require a rever-al of the judgment in the present case. There was no contention made in this case that merely leaving the hatch open constituted negligence. There is involved the additional element of the negligence of the defendant in furnishing to the plaintiff an unsafe place to work. The record supplies sufficient evidence to go to the jury on that issue and to support its implied finding thereon. Upon the record presented the submission to the jury of the instructions requested would be the practical equivalent of directing a verdict for the defendant. The facts do not present such a case as, without

question, entitles the defendant to the instructions on the question of assumption of risk, and the withholding of in-
[fol. 157] struction on that question, if error, was not prejudicial to him.

There was no failure to instruct the jury on the defendant's theory of the case. The submission of the case to the jury on the issue considered by it, was as favorable as the defendant could expect under the authorities herein cited.

We have examined the other specifications of error with reference to the refusal to give certain requested instructions and to the admission and exclusion of certain evidence, and find nothing in the rulings of the trial court which would justify a reversal.

The judgment is affirmed.

Shenk, J.

We concur: Curtis, J. Preston, J. Langdon, J. Waste, C. J.

[fol. 158] IN SUPREME COURT OF CALIFORNIA

In Bank

S. F. No. 14384

SPENCER

vs.

BEADLE S. S. Co.

ORDER DENYING PETITION FOR REHEARING—Filed Oct. 3, 1935

By the Court:

The Petition for a rehearing herein is denied.

Waste, Chief Justice.

Dated October 3, 1935.

[fol. 158½] [File endorsement omitted.]

[fol. 159] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

DESIGNATION OF PARTS OF RECORD TO BE CERTIFIED TO THE UNITED STATES SUPREME COUFT AS TRANSCRIPT ON PETITION FOR WRIT OF CERTIORARI—Filed Dec. 9, 1935

To the Clerk of the above-entitled Court:

You will please prepare and certify to the Supreme Court of the United States the hereinafter designated portions of the transcript of record in the above case which the defendant, George S. Beadle, hereby designates as the part of the record necessary for the consideration of his petition for certiorari in the Supreme Court of the United States, to-wit:

Parts of Clerk's Transcript

1. First Amended Complaint in the Superior Court of the State of California, in and for the City and County of [fol. 160] San Francisco;

2. Answer to First Amended Complaint;

3. Verdict;

4. Judgment on Verdict;

5. Stipulation consenting to reduction of the principal amount of Judgment as condition to denial of Motion for New Trial;

6. Order denying Motion for New Trial;

7. Notice of Appeal to the District Court of Appeal, First Appellate District of the State of California;

8. Request for Transcript of record on appeal;

9. Clerk's certificate to Clerk's Transcript;

Parts of Reporter's Transcript

The following portions of the evidence taken and proceedings had in the trial Court:

Plaintiff's Opening Statement:

Commencing at page	Commencing at line	Ending at page	Ending at line
2	14	2	20
6	25	7	6

Alfred Spencer:

	Commencing at page	Commencing at line	Ending at page	Ending at line
	12	15	13	12
	14	14	14	26
	19	19	21	1
	22	25	24	3
	25	5	32	10
	37	26	44	14
	73	3	76	22
	77	6	77	15
	78	5	78	6
	78	25	79	12
[fol. 161]	126	18	126	20
	129	25	130	23
	133	7	133	14
	133	24	134	15
	137	12	143	13
	149	19	149	22
	151	14	151	17
	154	4	154	17
	158	18	160	21
	168	23	168	25
	169	26	170	2
	170	23	170	24
	178	2	178	10
	178	24	179	6
	180	4	180	7
	197	22	198	13
	345	20	345	22
	346	15	347	4
	359	12	359	26
	365	4	365	12
	400	26	401	15
	411	4	411	11
	416	22	417	15

Plaintiff's Opening Statement: (Continued)

Walter Paul:

Commencing at		Ending at	
page	line	page	line
456	22	457	20
458	10	458	13
461	18	461	20
462	2	462	3
477	10	478	15

George S. Beadle:

Commencing at		Ending at	
page	line	page	line
102	20	102	25

John Samuelson:

Commencing at		Ending at	
page	line	page	line
563	15	563	21
563	26	564	5
658	10	659	2
659	16	659	19
662	23	663	7
664	7	664	24
668	9	669	4
671	14	676	22
676	25	677	7
[fol. 162] 681	13	682	26
691	7	691	26

William Vartnaw:

Commencing at		Ending at	
page	line	page	line
564	16	564	23
565	16	569	14
572	25	576	11
577	7	578	2
578	16	579	6
580	10	586	5
599	9	599	24
602	20	602	21
614	13	614	20
617	4	617	5
649	14	649	21

Plaintiff's Opening Statement: (Continued)

August Kruse:

Commencing at page	Commencing at line	Ending at page	Ending at line
694	4	707	5
714	22	714	23
715	14	715	17
719	19	719	22
720	4	720	9
723	18	723	21
724	16	724	23
725	10	725	15
727	14	727	21

10. Instructions requested by the plaintiff and given by the Court as the Court's Instructions:

Instruction No. III, commencing at page 819 line 13 and ending at page 820, line 13;

Instruction No. IX, commencing at page 823, line 24 and ending at page 824, line 11;

11. Instructions given by the Court of its own motion:

Instruction No. XV-a, commencing at page 827 line [fol. 163] 4 and ending at page 827, line 8.

12. Instructions requested by the defendant and given by the Court as amended:

Instruction No. II, commencing at page 837 line 24 and ending at page 838, line 11.

13. Instructions requested by the defendant and refused by the Court:

Instructions Nos. I, II, III, IV, V, VI, VII, VIII, IX, X, and XI, commencing at page 840, line 1 and ending at page 847, line 17;

Instructions Nos. XIV, XV, XVI, and XVII, commencing at page 848, line 9 and ending at page 849, line 16.

Instructions Nos. XIX and XX, commencing at page 850, line 1 and ending at page 850, line 16.

14. Opinion of the District Court of Appeal of the State of California, First Appellate District, Division One, filed December 28, 1934;

15. Opinion of the Supreme Court of the State of California, filed September 3, 1935;

16. Order denying petition for rehearing.

17. This designation of parts of record to be printed.

Dated December 9, 1935.

Harold M. Sawyer, Attorney for Defendant, George S. Beadle, Petitioner in the U. S. Supreme Court for a Writ of Certiorari.

[fol. 164] Receipt of a copy of the within Petitioner's Designation of parts of record to be printed is admitted this 9th day of December, 1935.

A. Don Duncan, Attorney for Plaintiff.

[fols. 165 & 166] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 167] IN SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

No. 234,720

ALFRED SPENCER, Plaintiff and Respondent,

vs.

BEADLE STEAMSHIP COMPANY, LTD., a Corporation, and George S. Beadle, Defendants; George S. Beadle, Defendant and Appellant

Additional Parts of Record to be Inserted in Appellant's Proposed Transcript on Application for Writ of Certiorari to the U. S. Supreme Court, and to be Printed as a Part Thereof

TESTIMONY OF ALFRED SPENCER

Direct examination.

Mr. Duncan:

Q. Now, Mr. Spencer, will you show the scene of this case here, looking through the ship? In other words, draw

roughly the lumber, and the timbers looking through the cross section of the ship.

A. Cross section?

Q. Yes.

A. All right.

Q. And that will illustrate the hatch coamings there too and hold?

(Witness marks on diagram.)

[fol. 168] Q. Looking at it as if it was cut right through. Now, this is the deck here (indicating).

A. Well, you want the cross section of the load?

Q. Yes, but showing it was built up from the deck. This is the deck here.

A. Oh.

Q. And use this for the hatch coaming here (indicating).

(Witness marks on diagram.) * * *

(Witness marks on diagram.) * * *

* * * * * * *

The Court: Is the map drawn now Mr. Duncan?

Mr. Duncan: Yes, the map is drawn your Honor. * * *

* * * * * * *

Direct examination (resumed).

Mr. Duncan:

Q. Mr. Spencer, you have now completed a drawing there, a rough drawing of a cross section of this ship as loaded, have you?

A. Yes. * * *

* * * * * * *

Q. And that is the payroll that Spencer signed after he was hurt?

A. I think he signed it. * * *

* * * * * * *

(The said document was thereupon duly received in evidence and by the Clerk marked Plaintiff's Exhibit Number 2.) * * *

Mr. Duncan: This is headed "Pay Roll, Voyage No. 59. We, the undersigned, late mariners on board the S.S. Fort Bragg of San Francisco, on her late voyage to Columbia River and return, now performed to this place of payment, each one for ourselves, with our signatures, acknowledge to have received of —— —— agent, for owners of said — the sum set opposite our names, it being in full amount [fol. 169] of our Wages for Services, and of all demands for Assault and Battery, or imprisonment of whatever name and nature, against said —, her owners, or officers, to the days of the date hereunder set against our names.

Dated, San Francisco, May 2, 1931." * * *

* * * * * * *

Q. Well, now, didn't they keep a record on board the vessel?

A. I think that they did, but the vessel was wrecked and the record, if on board, was lost at that time.

Q. Lost at what time?

A. At the time of the wreck of the steamer.

Q. In other words the Steamer Fort Bragg is now sunk, isn't it?

A. No, she was not sunk. She went ashore. She stranded.

Q. Oh, she stranded.

A. Yes, sir.

Q. And it is now a total loss?

A. Yes.

Q. In the mouth of Coos Bay?

A. Yes, on the south jetty.

Q. About two months ago?

A. I think it was two months. * * *

* * * * * * *

The Court:

Q. Was the hatch open or closed at that time, Mr. Witness?

A. Open your Honor.

The Court: Who said the hatch was open?

Mr. Duncan: Well, the plaintiff testified that the hatch was open.

The Court: At the time that his partner spoke to the mate, is that so?

A. Yes, your Honor.

Q. What did he say to the mate?

A. He asked the mate if he was going to close the open hatch.

[fol. 170] Q. What did the mate say?

A. And the mate said, "Never mind. Do your work."

Mr. Duncan:

Q. Now, that was—you started on this light lumber here after taking off the top load, that is, the load of lumber on top of the deck load, that is when you started down here, right next to the hold that he asked the mate about, is that so?

A. Yes. • • •

• • • • • • •

Q. Then there were at least six men working down in around this hold?

A. Around the hold.

Q. And two more probably up on top of the starboard side?

A. On the starboard.

• • • • • • •

The Court:

Q. When you piled lumber, in your experience, how did you pile it?

A. Well, it is customary, you know, to pile the lumber in a position like this one here (indicating).

Q. Pointing to what?

A. The outer edge of a deck load.

Q. Yes.

A. It is customary to put——

Q. Explain that in detail. How would your do it?

A. It is customary to pile it 12 inches high.

Q. Are you referring to timbers now, or boards and scantlings, timber?

A. No, not timber.

Q. Boards and scantlings?

A. Boards and scantlings.

Q. First you pile it 12 inches high?
A. 12 inches high.
[fol. 171] Q. And how wide?
A. Well, all over the deck.
Q. Then what?
A. Well, then you come up to the next 12 inches. You put laths, you know, about as thick as that (indicating.)
Q. You mean the next 12 inches on top of the first 12 inches?
A. Yes. You have laths.

Mr. Duncan:

Q. You mean laths—l-a-t-h-s?
A. Yes, they are about as wide as that. (Indicating.)

The Court:

Q. How are they placed?
A. Crossways.
Q. How many?
A. Well, in a distance of three or four foot from one to the other, on the outer edge only.
Q. On the outer edge?
A. Yes, they are about 3 or 4 foot long.
Q. They run crosswise?
A. Yes.
Q. Then on top of that what?
A. You put lumber again.
Q. And then what?
A. After you finish with the 12 inches across the deck you do the same way, proceed the same way.
Q. Crosswise with laths?
A. Yes.
Q. How high do you go?
A. Well, as high as the ship can carry the deck load.
Q. Well, how high is that?
A. Well, depending on how much she can carry.
Q. Depending upon the size of the deck and the ship, is that it?
A. That is what it is.
Q. Are you speaking of boards and scantlings when you say this?
[fol. 172] A. Well, with planks just the same. Boards, scantlings and planks.

Q. Not timber, though?

A. You even do it with timber. If you have loaded one tier of timbers all over the deck. Always you do on the outer edge, you put along laths.

Q. Well, these boards and scantlings that you say you were standing on——

A. Yes.

Q. (Continuing)—were they piled that way?

A. No, the load was landed.

Q. They were landed without the cross laths, is that it?

A. Yes.

. . . . . .

A. It is not a safe way if you haven't a binder.

. . . . . .

Q. Was that the—was there any custom about putting those heavy slings under a sling load in such position as that sling load was? . . .

. . . . . .

A. Yes. Why, you cannot get a load out without putting that heavy sling under.

Q. Yes. Was there any way of doing it other than the way you did it?

A. Well, I couldn't see any other way.

Q. Do you know of any other way?

A. Well, no, not that I know.

Q. Was it customary to do it any other way?

The Court: Were they in the habit of doing it any other [fol. 173] way?

A. Well, if there was a place, you know.

Mr. Duncan:

Q. I mean in this particular situation where you were at the time you fell?

A. Well, no, there wasn't any other way to do it.

Q. All right. Now, was there any custom or is there any custom about putting on the hatch covers on a vessel?

Mr. Street: Now, just a minute. Will you please qualify that to include the Fort Bragg? Vessels are not all alike.

I have no objection if counsel frames his question correctly.

Mr. Duncan: Well, if I understand it——

Mr. Street: It only goes to the form of the question, that is all.

The Court: Do you mean hatch covers on lumber vessels?

Mr. Street: Of this type.

The Court: Well, he says hatch covers on lumber vessels. Did you add, "Of this type"?

Mr. Duncan: Well, I will.

The Court: Read the question.

(Question read.)

Mr. Duncan: I will add to it to this extent: Where there is a deck cargo of lumber.

A. I didn't get you.

Q. Where there is a deck cargo of lumber?

A. Yes.

Q. The whole question is—if you will read it?

(Question read.)

The Court: What is the custom and practice, is that what [fol. 174] you want to know?

Mr. Duncan: Yes.

A. Yes.

Q. What is the custom?

A. The custom is—well, if you don't use the hold——

The Court: Is it the custom to keep the hatch covered or uncovered?

A. Covered.

Mr. Street: I object to that on the ground——

The Court: I will withdraw the question.

A. It is a custom to be——

The Court: Read the question that is in record.

(Question read.)

The Court: I will overrule the objection to that question. What is the answer?

A. Well, it is the custom to have the hatch closed.

Mr. Duncan: To have the hatch closed when?

A. When you don't use the hold.

The Court:

Q. When you don't use the hold?
A. Yes.
Q. Use the hold or hatch?
A. Yes.
Q. Hold and hatch are the same thing, aren't they?

Mr. Duncan: Yes, your Honor.

Q. Now, were you using the hold at all on the morning of this accident?
A. No.

. . . . . .

Q. At least, up to the time you fell?
A. Nothing going out and nothing coming in.
Q. Now is there any custom aboard ship, say on a lum- [fol. 175] ber ship, where there is an exposed edge of a pile of lumber, with regard to having any stanchions to support that lumber from toppling?

Mr. Street: Will you please read that question?

(Question read.)

Mr. Duncan:

Q. I mean after the lashings are removed, of course, when the vessel is in port?

The Court: You want to know if they put stanchions to support a pile of lumber on the deck?
Mr. Duncan: Yes, your Honor, to support—some timber of some kind.
The Court: What is your answer?

A. They do. On some vessels they do, and on some they don't, but that is the safest way.

Mr. Street: Now, I object to this witness testifying as to what is safe.
The Court: He has answered the question with that answer.
Mr. Street: I move the last part go out.
The Court: Well, some they do, some they don't, will stand. The rest of the answer will be stricken out.

Mr. Duncan:

Q. Now, is there a custom with regard to putting in laths to bind a load where there is an exposed edge of lumber that is going to be unsupported after they take the lashings off?

A. Yes.

Q. What is that?

A. Well, lumber which is piled or landed in the place like that, exposed——

Q. Like that—you are now referring to the way it was [fol. 176] put on the Fort Bragg, I take it?

Mr. Street: You are referring to your diagram now?

A. Yes, Well, it isn't the custom to have lumber landed in that place. That isn't the custom.

Mr. Duncan:

Q. It isn't the custom to have the lumber landed there at all, is it?

A. Yes.

Mr. Street: I object to that, if the Court please. He can testify as to what the custom is, but I don't think he can testify as to what it is not.

The Court:

Q. You said in your last answer it is not the custom to have lumber landed in that place, is that what you said?

A. Yes, your Honor.

The Court: That is his answer. Next question?

Mr. Duncan:

Q. Do you mean so close to the hatch coaming, is that what you mean?

A. Yes, that is what I mean.

The Court:

Q. Well, what is the custom, to land how far away from the hatch coaming?

A. Well, the custom is to pile that lumber in place like that, not to land.

Q. Is it the custom to have a place between the hatch cover and the lumber, a walking space around the hatch?

A. Well, that is the custom.

* * * * * * *

Mr. Duncan:

Q. If you quit and they did not discharge you, then what?

A. If I quit he has the right to hold my money back for three days.

Q. Did you have any money?

The Court: Any money coming to him?

[fol. 177] Mr. Duncan: Any money of his own to go back to San Francisco.

A. No, I didn't have none.

Q. And you were in Vallejo?

A. I was in Vallejo, yes.

Q. You lived in San Francisco?

A. I lived in San Francisco.

* * * * * * *

Cross-examination:

Q. By that you mean the ends were all evened up here (indicating)?

A. Yes, on the one end.

Mr. Duncan:

Q. Pointing to the after end?

A. Yes.

Mr. Street:

Q. They were all even on the after end?

A. Yes.

Q. But they were sticking out over here (indicating)?

A. Well, the other end, you know, one piece is one foot shorter, and one foot longer.

Q. I am talking about No. 9 now.

A. That is what I mean, you know. The other end didn't hold together even, you know.

Q. What other end?

A. The other end of the load.

* * * * * * *

[fol. 178] Q. All right, now, Mr. Spencer, 1 by 12 won't act that way, will it, won't topple over that way?

Mr. Duncan: How many 1 by 12's?

Mr. Street: All right, take eighteen 1 by 12's.

A. Well, it is just as dangerous, too.

Q. It is just as dangerous to work on 1 by 12's?

A. Yes. It has to be bound, you know. Without binding it is dangerous.

The Court:

Q. And with binding it is not so dangerous, is that it?

A. Yes, sir.

Q. That is the idea?

A. Yes, your Honor.

Mr. Street:

Q. You testified this morning, Mr. Spencer, and I believe also yesterday, that where there is an exposed edge you have laths in between?

A. Yes.

Q. So that is this No. 9 here that you were standing on——

A. Yes.

Q. Did have laths in between, then it was stowed just as the customs requires, wasn't it?

A. No, no.

• • • • • • •

Q. Isn't it a fact, Mr. Spencer, that while you were working there before you were hurt, the Captain came and told you how to do this job?

A. He came and told me?

Q. Yes.

A. Now, that is another story.

Q. Well, we will admit that that is another story. Is it a fact?

A. No.

Q. It is not?

A. He don't come and tell me what to do. That is what I [fol. 179] am there for. If I didn't know my work they would fire me.

Q. Isn't it a fact that he came to you and saw the way you were putting—stooping down and putting that sling load under there, and didn't he tell you, "You don't have to do that", that you could stand there and loop that wire under the end of that sling load?

A. No.

Q. Do you deny it?

A. No, he didn't. I didn't even see him.

Q. All right. That is all I want.

A. He was on the dock.

Q. All right, that is all I want.

A. He was on the dock.

The Court:

Q. Did he say anything to you at all?

A. No, I didn't see him. He wasn't on the boat at the time.

Mr. Duncan:

Q. Did he say he was or was not on the boat?

A. No. He was on the dock.

The Court:

Q. You didn't see him on the boat, is that what you say?

A. Yes.

Q. You saw him on the dock?

A. Yes.

Q. Did he speak to you from the dock?

A. No, he couldn't see me.

Mr. Street:

Q. Now, was he on the dock?

A. At that time.

Q. How do you know, Mr. Spencer? You were way down here with timbers all around you?

A. What?

Q. According to your story, you were way down here with timbers all around you. How do you know he was on the dock?

A. Because I could see. That is six foot.

[fol. 180] Q. You could see over 6 feet?

A. Well, when we took that load out. Listen now, Mr. Street. When we took that No. 6 load out, I was on top of that.

The Court:

Q. Could you see the Captain on the dock?

A. Yes, he was on the dock.

Mr. Street:

Q. I say, before you were hurt, earlier in the morning?

A. Earlier in the morning?

Q. Yes.

The Court: Well, now, what is your question? That the Captain spoke to him earlier in the morning?

Mr. Street: Yes, and warned him not to do——

The Court: Not immediately before this occurrence?

Mr. Street: No.

The Court: Well, there is another question. Earlier in the morning, sometime before this occurrence, did the Captain tell you how to put the sling on this lumber or give you any directions as to how it was to be done?

Mr. Duncan: How early, Mr. Street?

Mr. Street: Oh, I don't know what the time was any more than he knows when he was hurt.

The Court:

Q. Did the Captain an hour before, or at any time that morning before the accident, tell you how to put the sling onto this lumber, or did he give you any directions as to how it is to be done?

A. No. Hours before we was working——

Q. No. At any time?

A. Well, an hour before we didn't even work on that kind [fol. 181] of lumber.

Q. Before you went to work, or at any time that morning, or at any time before the time of the accident, did the Captain direct you how to do this?

A. He never spoke to me about any work.

Q. Never gave you any direction in regard to it?

A. No.

* * * * * * *

Mr. Street: Well, Mr. Witness, you said that this load was landed too close to the hatch, is that correct?

A. Yes, that is.

Q. Now, how close to a hatch should that load be landed?

A. Well that lumber there——

Q. Well, should there be any space between the load and the hatch on the deck in loading the lumber?

A. Well, that space can be wider.

Q. Can be what?

A. It can be left more space, you know, to walk around the hatch.

Q. Should space be left to walk around the hatch on the deck?

A. On the deck.

Q. I say, should that be?

A. Yes, it should be.

Q. It should be?

A. Yes.

Q. In other words, your statement is that the lumber should not be placed on the deck so close to the hatch that space—that there would be no space for a person to walk around the hatch, is that it?

A. Yes, your Honor.

[fol. 182] Q. There must be walking space around the hatch?

A. Yes, your Honor.

Q. That is what you say?

A. Yes, your Honor.

Q. And lumber should not be piled too close to the hatch to prevent such walking space, is that what you mean?

A. Yes, your Honor.

The Court:

Q. That is what you say?

A. Yes, your Honor.

The Court: That is his position.

* * * * * * *

Plaintiff's Rebuttal

* * * * * * *

Q. Now, you heard the Captain testify about some conversation he stated he had with you the morning before you

were hurt shortly after 8 o'clock about giving you some instructions as to how to pass a sling under a sling load. Did you hear his testimony?

A. Yes, I heard his testimony.

Q. Now, did you have that conversation?

A. I never had.

Q. Did you have any such conversation?

A. I had a conversation.

Q. With the Captain?

A. After the fall in.

Q. But I mean before you were hurt?

A. Before, not.

Q. Did you have any conversation with him before you were hurt?

A. No, none.

Q. Was it at all customary for the Captain——

Mr. Street: Now, I object to that.

The Court: Yes, I will sustain the objection. Did he warn you to be careful at all when he passed by? Did you hear [fol. 183] him say that?

A. I never heard about that, because I know when there is a danger that I have to be careful. I am watching out for that. They don't have to remind me of that.

* * * * * * *

Testimony of Walter Paul

Mr. Duncan:

Q. Did you say anything to the mate about the hatch covers being put on?

A. Yes.

Q. What did you say to him about that?

A. Well, I asked the mate when he told us to take that lot of lumber, I asked him if he wasn't going to put the hatches on first.

Q. You mean when he ordered you to work on this lumber close to the open hold?

A. Yes.

Q. And what did he say?

A. I don't remember exactly what he said, but I think he said it was not necessary, that we could get the lumber out without putting the hatches on.

• • • • • • •

Q. Now how long would it have taken to put those hatch covers on to close that hold?

[fol. 184] Mr. Street: I object to that on the ground it calls for his conclusion.

The Court: If he knows he can tell.

Mr. Street: We will stipulate it can be done in about ten minutes.

The Court: Let him answer if he knows. Do you know how long it takes to put those hatch covers on?

Mr. Street: I will withdraw the stipulation.

The Court: Well, that is the question. What is the answer?

A. About five minutes.

• • • • • • •

Mr. Duncan:

Q. When you asked if he was going to put the hatch covers on, was Spencer close to you?

A. Yes.

• • • • • • •

Q. And then how was Spencer putting the heavy sling under the slingload?

A. Well, he was—the slingload had not come quite clear of the other lumber so he was—he had to stick one end of the sling underneath.

• • • • • • •

Mr. Duncan:

Q. Was that the—the way Spencer put the sling under the slingload, was that the customary and proper way for any seaman to put a sling under a slingload under the circumstances existing with regard to this particular job of unloading?

Mr. Street: I object on the ground it invades the province of the jury, and move that the word "proper" be stricken. [fol. 185] The Court: Well, I will overrule the objection. "Proper and customary" is the question.

Mr. Duncan:

Q. Did you get the question?
A. Yes. It was the proper way on this particular load.
Q. On that particular load?
A. Yes.

The Court:

Q. What about the custom? Was there a custom in regard to it?
A. Yes, it was the custom.

Mr. Duncan:

Q. You mean to do it the way he did it?
A. Yes, sir.

* * * * * * *

Mr. Duncan:

Q. Was any cargo taken out of the hold or any cargo put in the hold at Vallejo that day?
A. Not that day.
Q. Not that day?
A. No.
Q. In other words, the hold was not used that entire day?
A. No.
Q. That is correct, is it?

The Court: That is the day of the accident, counsel?
Mr. Duncan: Yes, your Honor.

* * * * * * *

Q. Hasn't it been your experience on a trip when you are in port and you have got cargo in the hold and got cargo on deck to be working on the deck load and the mate come to you and say, "You fellow go down in the hold and start discharging from the hold"?
A. Yes, they have done that.

[fol. 186] Q. In other words, you might interrupt the work that you are doing, mightn't he?

A. Well hardly ever interrupt the work we are doing.

Q. No. He says, "Finish that job and then go down in the hold. We are going to discharge from the hold."

A. Yes, sir, sure.

• • • • • • •

Redirect examination.

By Mr. Duncan:

Q. Mr. Paul, assuming the facts to be that you are ordered to unload some lumber on a lumber vessel placed on the deck about four inches from the hatch coaming and running right straight up in successive slingloads to the top of some heavy timbers at the back of those slingloads—the timbers being about say 12 to 14 feet above the deck-load, and assuming that you are working on the forward part of that smaller lumber stowed in between the heavy timbers and the open hold getting them out with slings, what is the custom, if any, with reference to having the hatch covers on or off?

Mr. Street: Object to the hypothetical question.

Mr. Duncan: I will amend the question to this extent: assuming the facts to be that thos- heavy timbers are stowed between the bulwarks up to the single piles of successive slingloads of lumber, and that the heavy timbers extend to within about 40 inches—that is the edge of the pile of heavy timbers on top of the deck extends to within about 40 inches of the hatch coaming and that this smaller lumber, [fol. 187] say 1 by 8's or 2 by 4's, whatever it may be, is placed in there between these heavy timbers and the hatch. Now if you are ordered to work in such a place as that taking off—taking off this smaller lumber near the top of the heavy timbers—that is the smaller lumber between the heavy timbers and the hatch, what is the custom, if any, with reference to putting the hatch covers on or leaving them off?

• • • • • • •

A. The custom is to always put the hatches on.

Q. And when you refer to hatches, do you mean hatch covers?

A. Yes, strong-backs and hatch covers.

Q. They always put the strong-backs and hatch covers on?

A. Yes.

Q. Now did the circumstances I have outlined correspond to the circumstances on the "Fort Bragg" the morning you were unloading this lumber?

A. Yes.

Q. And the hatch covers were not on?

A. They were not put on.

* * * * * * *

The Court: If the hatch covers were on and the consignee came and wanted his lumber out of the hold, what would be the custom?

Mr. Duncan: Yes.

Mr. Street: Custom as to what?

Mr. Duncan: As to taking the hatch covers off and putting them on again.

Mr. Street: All right.

The Court: Well, what would happen, Mr. Witness?

[fol. 188] A. Well, we would take the hatches off.

Q. And then after the lumber was taken out what would you do?

A. Put the hatches back on again.

GEORGE S. BEADLE

Cross-examination.

Mr. Duncan:

Q. Now, Mr. Beadle, did you make up any rules or have any rules made up for the guidance of the officers aboard ship with regard to the—I am referring now to the Fort Bragg—with regard to loading and unloading operations? I mean safety rules, a set of safety rules that they should observe?

A. No sir.

Q. You didn't make up any kind of rules for their guidance?

A. No.

Q. Were they going by any safety rules?

Mr. Street: I object to that on the ground it is immaterial, invading the province of the jury. What if he did make rules? It doesn't make any difference.

The Court: Well, were they going by any rules, he said. That is proper.

A. No set rules that I know of.

Mr. Duncan:

Q. You didn't make up or promulgate any rules for them to guard against accidents to seamen?

A. Specific rules?

Q. Yes?

A. No.

. . . . . .

[fol. 189] Testimony of JOHN SAMUELSON

Q. You told him?

A. Yes.

Q. Not to go inside?

A. Not to go inside.

Q. With the sling. To sling that load that you were talking about right then?

A. Yes, sir.

Q. Is that it?

A. Yes, sir.

Q. Now, why did you tell him that?

A. Because I was afraid if he went inside he would fall down in the hold.

Q. Oh, I see. Was there anything going through the hold?

A. What is that?

Q. Was there anything—was that hold being used for cargo at all? Any cargo going in or coming out of it?

A. Not at that time.

Q. Now, you were afraid he would fall in the open hold if he did it any other way, is that it?

A. Any other way?

Q. Then the way you say that—according to what you told him?

A. Yes.

. . . . . .

Mr. Duncan:

Q. Isn't it a fact, Captain, that it is a general rule of safety on all vessels that whenever operations through the hatch are suspended or terminated, that the hatch covers should be put on or a safety line stretched around the hatch coaming to prevent people falling into the hatch?

A. When operations are suspended, yes.

• • • • • • •

Q. Then you don't know from where he fell, do you?

A. I didn't see him fall.

[fol. 190] Mr. Street: I will stipulate he did not.

Mr. Duncan: All right. You will stipulat- he didn't know from where he fell.

• • • • • • •

Testimony of William Vartnaw

Cross-examination:

Q. Isn't it a fact, as you say, that usually you pile the lumber by hand all over the deck?

A. Yes.

Q. Solid, that is a fact, isn't it?

A. Yes.

Q. That is the usual practice?

A. Yes.

Q. In other words—let me make sure that I understand you.

A. Yes.

Q. You usually, no matter what kind of lumber you have got, take it and pile it piece by piece?

A. Yes, sir.

Q. All over the deck?

A. Yes.

Q. So that it is a solid whole?

A. Yes.

Q. And this was unusual this trip?

A. Well, it was nothing unusual, only we put the timbers first, and then filled in three feet between the midships and the tank. Each side was 3 feet. We took the timbers in, and the lumber we put in amidships, and on top of the timbers that came in in Coos Bay.

Q. You put the timbers down on the deck and then piled these on top?

A. The timbers were on top of the lath, and there was a space in the midships that we described here yesterday, left between the tanks three feet, that was too short for [fol. 191] timbers. Timbers were about 52 feet long, and between the tanks was only 45 feet. So there was some space we had to fill with smaller lumber.

Q. In this case you couldn't pile the lumber by hand all over the deck as you usually did, because the long timbers would not go in between those steel tanks at each end of the hatch, that is so, isn't it?

A. That is so.

Q. And it left a space there of about 3½ feet or so——

A. Yes——

Q. (continuing)—that you wanted to utilize?

A. Yes.

Q. And on the previous trip that Spencer made the lumber was piled by hand all over the deck, wasn't it?

A. Yes.

Q. And as you usually did?

A. Usually. Well, I don't know. Well, we always did that way. That is usual.

Q. Oh, you don't remember that trip?

A. Well, I remember we had no*t* timbers.

Q. You remember you had no timbers?

A. No timbers like that. And so we put lumber all over. Worked it right across the deck from the hatch to the rail.

Q. From the hatch coaming——

A. To the rail.

Q. (Continuing)—to the rail?

A. Yes.

* * * * * * *

Q. Did you load the same way precisely on the starboard side as you did on the port side?

A. Yes, both sides alike.

* * * * * * *

Q. And why did you do that?

A. Well, they are more solid. Then they don't slip off.

Q. They are more solid with the laths every 12 inches?

A. Yes.

* * * * * * *

[fol. 192] Mr. Duncan:

Q. Would 2 by 3's, a landed load, be as solid as a piled load of 2 by 3's?

A. 2 by 3's won't be that.

Q. They won't be as solid?

A. No.

* * * * * * *

Q. Now, this book that you have referred to, does this show where on the deck these different kinds of lumber were placed?

A. No. It just shows which is put on deck and which is put in the hold.

Q. All this shows is that some of this cut lumber was put on the deck?

A. Yes.

Q. That is all it shows?

A. That is all.

Q. And it doesn't show where it was put?

A. No.

Q. Now, as to where it was put on deck, that is entirely from your memory, isn't it?

A. Yes.

* * * * * * *

Q. Now, I understand you to say, Mr. Vartnaw, that you didn't generally place any lumber in between the tanks this way; that you generally hand piled the lumber all over the deck between the bulwark and the hatch coaming, is that so?

A. Yes.

Q. And that is what you almost always did, wasn't it?

A. Yes.

Q. And was this the first time that you ever put lumber in that place, separate packages of lumber, between the two tanks and between heavy timbers and the hatch coaming?

A. Yes. That I remember.

Q. The first time that you ever did that?

A. That I remember.

[fol. 193] Q. Then this was a very unusual situation, wasn't it?

A. Not so unusual. But——

Q. Well, it is the first time you ever did it?
A. It is the first time I done it, yes.

* * * * * * *

Q. On the contrary, Mr. Vartnaw, wasn't it very unusual to order men to work on the edge of lumber, of a tier of lumber about 36 inches wide, piled between these timbers and the hatch coaming, over an open hold?

Mr. Street: I object to that, on the ground that it is argumentative, complex and compound.
The Court: Objection overruled.
Mr. Duncan: Will you answer that, please?
The Court: Read it.

(Question read.)

Mr. Duncan:

Q. When nothir going in or out of the hold? I will add that.

Mr. Street:

Q. Do you understand the question?
A. Yes, I understand the question.

The Court: If you don't it can be read to you again.

A. No, I understand it. It is not so unusual.

Mr. Duncan:

Q. Not so unusual?
A. No.
Q. But it was unusual?
A. It was not so unusual.
Q. Well, it was the first time that you ever did it, wasn't it, anyway?
A. Yes.

* * * * * * *

[fol. 194] Testimony of August Kruse

Mr. Duncan:

Q. All right. You say you remember. What do you remember about it? About the placing of that lumber?

A. I remember there was some 1 by 12's was stowed, and some was landed.

Q. Some was stowed and some 1 by 12's was landed?

A. Yes.

Q. You are sure of that?

A. I am sure of that.

Q. And where was the 1 by 12's stowed—hand piled?

A. Some was hand stowed underneath the landed loads.

Q. Underneath the landed loads?

A. Yes, sir.

Q. Right next to the deck?

A. Right next to the timbers.

Q. Right next to the timbers?

A. In that small space, about 3 foot space.

Q. And between the timbers and the hatch coaming on the deck?

A. No, that wasn't on the deck. There was something underneath yet. Some laths was underneath.

Q. And how high up did the laths go from the deck?

A. Laths came about a foot or so above the hatches.

Q. A foot or so above the hatches?

A. Above the hatch coamings.

Q. And then was there some 1 by 12's hand piled above that?

A. The 1 by 12's was stowed, hand piled, on top of the laths.

Q. On top of the laths. How many sling loads.

A. I don't remember how many sling loads.

[fol. 195] Q. You don't remember that?

A. No, sir.

Q. But on top of those were landed sling loads, were there?

A. Yes.

The Court:

Q. On top of what?

Mr. Duncan: On top of the 1 by 12's that were hand piled.

The Court: Then on top of those were what?

Mr. Duncan: Then on top of those were landed sling loads, he says.

Q. And you don't remember how many landed sling loads were on top?

A. No, I don't.

Q. Now, you say when you went forward to get a sling that you saw Spencer?

A. Yes, sir, I did.

Q. Who was working with him?

A. Another fellow was working with him.

Q. Who?

A. A fellow by the name of Paul.

Q. By the name of Paul?

A. Yes, sir.

Q. Were they working down in this narrow space between the heavy timbers and the hatch coaming?

A. There wasn't a narrow space.

Mr. Street: I don't think the witness has testified yet how narrow the space was.

Mr. Duncan: Absolutely he testified it was 3 feet.

The Court: Yes, he said that all along, about 3 feet.

Mr. Street: Very well.

A. They wasn't in that narrow space. It was almost [fol. 196] even with the hatches. I mean deck load.

Q. It was almost even with the deck load?

A. Almost even with the timbers.

The Court: What was?

A. The load what was landed on top of the stowed lumber.

Mr. Duncan:

Q. Almost even with the timbers?

A. Almost even with the timbers.

Q. The sling load they were getting out?

A. Yes, sir.

* * * * * * *

Q. Was it completely raised, or just one end of it?

A. Just one end of it.

Q. And was anybody standing on that load raised in that position?

A. Nobody was standing on the load.

Q. Now, where was Spencer standing when it was raised in that position?

A. He was standing in front of that load next to the open hatches.

Q. There were three other crews of men working there around the hold, weren't there?

A. How many?

Q. Three, of two men each?

A. Well, on the forward end was working two men on that side.

Q. What is that?

A. Both sides was working too sides.

Q. Two men?

A. The forward.

Q. Well, there were two men forward and two men aft on each side of the ship, wasn't there?

A. Yes, sir.

Q. So there were three crews working around that open [fol. 197] hold, wasn't there?

A. Yes, sir.

Q. Three crews of two men each?

A. Two men each, yes.

The Court:

Q. Three crews of two men each were working around the neighborhood of that hold, is that what you say?

A. There was eight men altogether.

Mr. Duncan:

Q. Eight altogether.

The Court: That would be four crews of two men each.

A. That would make four.

Q. Then working in the neighborhood of that hold, is that it?

A. Yes, sir.

* * * * * * *

Q. When it is hand piled?

A. When it is hand piled.

* * * * * * *

Q. Now, which tackle were they using, the forward tackle or the after tackle?

A. Forward tackle.

Q. And isn't it a fact that that forward tackle was geared so that the line of operations was forward from the end of this sling load that they had the pick-up sling under?

Mr. Street:

Q. Do you understand that question?

A. I understand. The tackle that was trimmed that way, the falls lead more aft from the load.

Mr. Duncan:

Q. If that is so, your line of operations would be more aft from where Spencer was, is that it?

A. Yes, sir.

Q. Well, isn't it a fact, however, that your line of operations—let me ask you this—it is a fact, isn't it, that in [fol. 198] regard to ship's tackle, working ship's tackle, taking loads in and out of a hold and landing them on the dock, that the tackle is trimmed so that you have one certain line of operations right straight across the ship, that is so, isn't it?

A. Yes.

Q. And you cannot vary that unless you change the booms?

A. Yes, sir.

Q. So that one straight line right across the ship, that is your line of operation. In other words, you take something out of the hold at one time, and according to the way the booms are fixed, it goes right straight up and right straight over onto the dock?

A. Not all the time.

Q. I mean, unless you change your booms?

A. Yes.

Q. That is so, isn't it?

A. The booms is sometimes trimmed that way, too.

Q. But whatever way the booms are trimmed, as long as they are trimmed that way, you have one certain straight line of operation?

A. One certain straight line.

Q. Always a straight line?

A. Yes, sir.

Q. And that cannot vary unless you change your booms, can it?

A. Except you trim the booms.

Q. That is, lower one, or something of the kind, move them?

A. Yes, sir.

. . . . . .

Q. All right. Now, this one that you said you saw him taking out was the one right up level with the timbers, was it?

[fol. 199] A. That was almost level with the timbers.

Q. Almost level with the timbers?

A. Yes, sir.

. . . . . .

Mr. Duncan:

Q. But you do know this sling load they were working on was up level with the top of the timbers?

A. A little below the timbers.

Q. How much below?

A. It would be only a few inches.

Q. A few inches?

A. Yes, sir.

Q. Only a few inches below the top of the timbers.

. . . . . .

Q. Where were you standing when you saw him in the hold?

A. I was standing on top of the lumber what was stowed.

Q. That was in other words, the top of the deck load?

A. Yes, sir.

. . . . . .

PAUL THORN, called as a witness on behalf of the plaintiff in rebuttal, and having been first duly sworn, testified as follows: 24 Coso Avenue, San Francisco, California.

Direct examination.

Mr. Duncan:

Q. Mr. Thorn, what is your vocation, what do you do?

A. I am an A. B.

Q. A. B. means Able Seaman?

A. Yes, sir.
Q. And how long have you been engaged in that vocation?
A. On steam schooners since 1911.
[fol. 200] Q. Along the Pacific Coast?
A. Yes, sir.
Q. And how long before that elsewhere, if any?
A. Since 1902, deep water.
Q. Deep water. You have—on lumber schooners you have had, then, experience since 1911, did you say?
A. Yes, sir.
Q. 1911—21 years?
A. 21 years.
Q. Loading and unloading?
A. Yes, sir.
Q. Steam schooners?
A. Steam schooners.
Q. And lumber steam schooners?
A. Yes.
Q. Along the Pacific Coast?
A. Yes.
Q. As an A. B. Seaman?
A. A. B.
Q. Now were you a member of the crew of the Steamship Fort Bragg on May 4th, 1931?
A. Yes.

Mr. Street: Stipulate he was.

Mr. Duncan:

Q. And how long had you been a member of the crew of that particular vessel?
A. About two months previous to the accident.
Q. And how many trips had you made?
A. Three trips.
Q. Three trips?
A. Yes, sir.
Q. Do you know the plaintiff, Alfred Spencer?
A. Yes, sir, I know him from the time he shipped in the Fort Bragg, you know.

• • • • • • • •

Mr. Duncan:

Q. Referring back to the sling loads on the dock, I understood you to testify already that the sling loads were

picked up and put in that place as they came from the dock?

A. Yes, sir.

[fol. 201] Q. Is that so?

A. Yes, sir.

Q. Now, you understand the place I am referring to?

A. Yes.

Q. Between the heavy timbers and the hatch coaming?

A. Yes.

Q. There was a place there about 3 feet wide, wasn't there?

A. About three feet.

Q. And between the two tanks on either end of the hatch?

A. Yes.

Q. Now, you say—let me ask you this: Were they all landed sling loads that were put in there, or——

Mr. Street: Now, wait a minute. That is enough. Anything else would be suggestive.

Mr. Duncan: All right.

The Court: Did he say that sling loads were put in there?

Mr. Street: Yes.

The Court: Then the question is were they all landed sling loads?

Mr. Street: That is proper, yes, but he is going to add an "or" now and give an alternative.

The Court: Yes.

Mr. Duncan:

Q. Were they all landed sling loads?

A. All landed loads, yes.

* * * * * * *

Mr. Duncan:

Q. Did you look down into the hold after he fell?

A. Yes, sir,

[fol. 202] Q. What did you see down there?

A. I seen him laying down. When he fell he landed on his feet and hit his head on a strongback. He landed on his feet and fell over on the strongback.

Q. Then what did he do?

A. Then he crawled out to get clear of the hatch, because some lumber was coming down after him.

Q. What kind of lumber was that?

A. I couldn't say what size it was, but there was some lumber over the loads.

Mr. Street: I object to the last answer as being a conclusion of the witness.

The Court: Well, that is his answer. I will let it stand. He cannot tell what kind it was.

Mr. Street: I will withdraw the objection.

Mr. Duncan:

Q. How many pieces came after him, about?

A. I couldn't say exactly. Maybe seven or eight pieces.

Q. There was more than one anyway, was there?

A. Yes.

• • • • • • •

Mr. Duncan:

Q. Is there any custom among —, say on steam schooners along the Pacific Coast with relation to putting on the hatch covers when there is a big load of lumber being unloaded from the deck, and there is no—and the hold is not being used and there is no cargo going into the hold or coming out of it, is there any custom?

Mr. Street: Just a moment. Will you also add to that the fact that there is lumber in the hold and that the Captain does not know when it is to come out?

[fol. 203] Mr. Duncan: No, because I don't think that has anything to do with it.

Mr. Street: Well, you are trying to hold this up to an absolute standard, and I don't think he can.

The Court: Read the question.

(Question read.)

The Court: The hold is not being used at the particular time they are taking this lumber off the deck, is that what you mean?

Mr. Duncan: Yes, your Honor.

The Court: Do you add that?

Mr. Duncan: Yes, your Honor.

The Court: I will overrule the objection.

Mr. Duncan: Is there such a custom?

A. There is.

Q. And what is the custom?

A. Put the hatches on when you work the deck.

Q. And that is an invariable custom, isn't it?

A. Yes.

* * * * * * *

Mr. Duncan: Is there any custom with reference to that situation when you were working as you were this morning unloading lumber from the inside of heavy timbers near an open hold, any custom with relation to putting on the hatch covers?

A. Well, I never seen lumber stowed that way.

Q. You never saw lumber put in between heavy timbers and the hatch coaming that way?

A. No, because it was such a small space.

Q. It was the first time you had ever seen that?

A. Yes.

[fol. 204] Q. And you cannot say whether there is any custom, because it is the first time, is that it?

A. Yes.

* * * * * * *

PLAINTIFF'S REBUTTAL

Mr. Duncan: I will read, if the Court please, from the deposition of John Delaney heretofore read from by counsel for the defendant, and referred to——

Mr. Street: Just a moment, until I get my copy, please.

Mr. Duncan: Page 3, direct examination by the attorney for plaintiff. (Reading.)

"Q. How long have you been an A. B.?

A. About twenty years.

Q. As such seaman, have you been engaged at various times in loading and unloading vessels?

A. I have, yes."

* * * * * * *

"Q. Do I understand you to testify that the space between the edge of the heavy timbers and the hatch coaming,——"

* * * * * * *

"Q. Between the hatch coaming was filled with small lumber?

A. Yes.

Q. What size were those pieces?

A. It was 2 by 3 or 2 by 4.

Q. About how long were those smaller pieces?

A. They ranged in length from 8 feet to 12 feet. All short stuff.

Q. About how wide were those? About how much space did those smaller pieces of lumber take up, that is, the [fol. 205] whole thing?

A. Maybe about three feet. I am not sure just exactly how wide it was. I would say three feet anyhow.

Q. Would you say it was approximately one sling load thick in width between the heavy timbers and the edge of the hatch coaming?"

Mr. Street: I object to that on the ground assuming facts not in evidence.

The Court: Objection overrules.

Mr. Duncan: (Reading.)

"A. Just about that."

* * * * * * *

"Q. Tell me, as far as you can remember, what kind of lumber was first loaded on the deck between the hatch coaming and the port rail?

A. Some timber, heavy timbers, and some small lumber.

Q. The heavy timbers, you say those were 12 x 12?

A. Something like that.

Q. How long were they?

A. 25 or 30 feet perhaps. I am not sure of the length.

Q. Where were they stowed? Were they right on the deck?

A. They were laying right on the deck.

* * * * * * *

"Q. Would landed sling loads be more apt to topple than a piled load?

A. I would say they would."

Mr. Street: No objection to that.

Mr. Duncan: Is it admitted?

Mr. Street: I don't see how you can get around it.

* * * * * * *

[fol. 206] EXCERPT FROM ARGUMENT UPON THE CAUSE CONCERNING THE INTRODUCTION IN EVIDENCE OF CERTAIN DIAGRAMS.

Mr. Street: Now, just a moment. I object to Mr. Duncan using those diagrams. They are not in evidence.

Mr. Duncan: Well, I think I am entitled to use the diagrams, your Honor, for the purpose of illustration.

The Court: We were to take that up in Chambers this morning, but we didn't do it.

Mr. Duncan: The witnesses all testified——

The Court: It appears by this blackboard that the witnesses when they testified drew these lines on the blackboard and referred to these lines on the blackboard, is that correct?

Mr. Duncan: Yes. Not on this side. On the other side. Counsel has turned it around so the jury could not see it.

The Court: If they referred to it I think you can refer to it in your argument.

Mr. Street: They ought to be in evidence, then.

Mr. Duncan: Well, you objected to their going in evidence.

Mr. Street: I do. But if you are going to use them, they ought to be in evidence.

The Court: There is no way of putting a blackboard in evidence.

Mr. Street: Well, Mr. Duncan can take a photograph of it.

[fol. 207] The Court: Well, at any rate, this side is not the side of the blackboard referred to by the witnesses.

Mr. Duncan: No, that is true, your Honor.

The Court: Well, turn that around. Let us see the side of the blackboard that was referred to by the witnesses during their testimony and the lines drawn there by the witnesses during their testimony.

(Mr. Duncan thereupon turned the blackboard around.)

The Court: Is that the board referred to by the witnesses in their testimony?

Mr. Duncan: Yes, your Honor. The plaintiff drew all those diagrams, practically. I started the top one, and he finished it, the plaintiff himself.

The Court: And he referred to that blackboard and those illustration- in connection with his testimony?

Mr. Duncan: Yes, it is all through the record, your Honor.

The Court: Well, to that extent, it is admissible. You had better take a photograph, if necessary, if you want to put it in evidence; but if the witness referred to it in his testimony, you are entitled to refer to it in your argument.

Mr. Duncan: He did, your Honor.

The Court: He drew those lines and referred to that board, both himself and other witnesses. Didn't Paul and others?

[fol. 208] Mr. Duncan: No, Paul was not permitted to refer to it; but the plaintiff drew it and——

The Court: And referred to it.

Mr. Duncan: And he referred to it all through his testimony.

The Court: Well, then, it is admissible.

Mr. Street: Now, just a moment, if the Court please. I refer, your Honor, to the evidence in the testimony of Mr. Paul, where the Court says, "If that diagram was in evidence you could refer to it, but it has not been introduced in evidence.

Mr. Duncan: Well, I am going to offer it in evidence."

The Court: Well, he offers it now.

Mr. Street: You offer it now, do you?

Mr. Duncan: I offered it before and you objected to it.

Mr. Street: And I object to it.

The Court: The objection will be overruled.

Mr. Street: Just a moment until I make my objection.

The Court: You made it heretofore, didn't you?

Mr. Street: No, I did not, your Honor.

Mr. Duncan: It was offered and counsel objected to it and it was not ever admitted.

Mr. Street: No, this is the first time it has been offered, and Mr. Duncan says, "Well, I am going to offer this in evidence", and then the Court says, "Well, so far as this [fol. 209] Witness is concerned you will have to make him use his own diagram." Now, my objection to those diagrams is this——

The Court: Those? There is only one there, isn't there?

Mr. Street: No, there are four, I think.

The Court: All right, there are three on one side of the blackboard.

Mr. Street: My objection is that the evidence discloses that they are not fair representations of the facts.

The Court: Well, I will overrule the objection. They are the representation of the facts, according to the plaintiff's testimony, and that stands for what it is worth. Whether it is true representation or not is a matter of cross examination, and also offering other diagrams, which the defendant would consider a true representation.

Mr. Street: And Mr. Duncan will make the photographs to put in evidence, will he?

The Court: I suppose it will have to be done to be put in evidence. Otherwise it won't be in evidence. There will have to be a photograph of it made.

Mr. Duncan: All right, your Honor. My point was this, your Honor: I don't see why the plaintiff should be compelled to make a photograph of that.

The Court: Anything you offer in evidence has to be a reality. It has to be in existence.

[fol. 210] Mr. Street: Well, if Mr. Duncan wants to put it in evidence, and the Court admits it over my objection, I will pay for the photograph in evidence. That is fair enough.

Mr. Duncan: Well, I think that is fair enough. My purpose was simply to refer to it in argument.

The Court: Well, if you refer to a diagram the other side can insist it be offered in evidence so that they can also refer to it. They can also attack it, if necessary. So the motion of the defendant that it be offered in evidence is reasonable. That is, at least, the suggestion of the defendant that if it is admitted in evidence it should be photographed and actually put in evidence.

Mr. Duncan: Yes, if he wants to pay for it——

The Court: Well, he says he will. He says he will volunteer to do so.

Mr. Street: Yes, we will, and I have no objection to the introduction of it on the ground that it was not introduced during the time that counsel was—before he closed his case. My only objection goes to those grounds I stated.

The Court: Very well. It is in evidence.

(The said diagrams were thereupon duly admitted in evidence and by the Clerk marked Plaintiff's Exhibit 9.)

* * * * * * *

Mr. Street: If the Court please, about this photograph here, it is stipulated, is it, Mr. Duncan, that after the photograph is taken it may be introduced in evidence and considered as your exhibit.

Mr. Duncan: So stipulated.

* * * * * * *

[fol. 211] INSTRUCTIONS GIVEN BY THE COURT OF ITS OWN MOTION

XV

Plaintiff alleges that the defendant has been guilty of negligence. The defendant denies that he has been guilty of any negligence and denies any responsibility in this matter. The defendant has also pleaded contributory negligence on the part of the plaintiff. Before the plaintiff can recover in this case he must prove by a preponderance of evidence that the defendant has been guilty of negligence. He must also prove that such negligence, if any, was the proximate cause of the injury. The only duty required of the defendant according to law was to provide a reasonably safe place for this plaintiff to work. If you find from the evidence that the defendant provided a reasonably safe place for the plaintiff to work, then your verdict must be for the defendant. If you find that the defendant did not provide a reasonably safe place for the plaintiff to work, then the defendant would be guilty of negligence; and provided you find that such negligence was the proximate cause of the in-

jury, the plaintiff can recover, even though you should find that the plaintiff was guilty of contributory negligence because contributory negligence is not a complete defense under the Jones Act, but would go in mitigation or diminution of damages only.

* * * * * * *

[fol. 212] XXVIII

Before the plaintiff can recover in this action it must first appear by a preponderance of the evidence that the defendant, or his servant, was guilty of some act of negligence which contributed proximately to the accident.

XXIX

The proximate cause of an event must be understood to be that which, in the natural and continuous sequence, unbroken by any new, independent cause, produces that event and without which that event would not have occurred. It is the efficient cause, the cause without which the injury would not have occurred.

INSTRUCTIONS REQUESTED BY THE DEFENDANT AND GIVEN BY THE COURT AS AMENDED

III

The plaintiff in this case was a seaman and although he may not have signed articles he was, as a seaman, entitled, under the maritime law, to be cured at the expense of the defendants without reference to any question of negligence. If you find, therefore, that the defendant(s) placed the plaintiff in a hospital and furnished him with medical attention at (their) [his] own expense, you are not to construe such act(s) on (their) [his] part as an admission that (they were) [he was] in any way responsible for the plaintiff's injuries. Furnishing the plaintiff with medical attention [fols. 213-216] was something which the defendant(s were) [was] bound to do (no matter how) [even if he was] free from negligence. (they were).

(Portions in parenthesis stricken out by the court and portions in brackets added by the court.)

V

You are hereby instructed that the defendant George S. Beadle [was bound to provide plaintiff with a reasonably safe place to work but] was not bound by law to furnish the plaintiff with a place to work which was absolutely safe. An employer does not insure the safety of his employees.

(Portions in brackets added by the Court.)

Given as amended.

E. P. M., J.

[fol. 217] [File endorsement omitted]

[fol. 218] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

RESPONDENT'S DESIGNATION OF ADDITIONAL PARTS OF RECORD TO BE INSERTED IN APPELLANT'S TRANSCRIPT ON APPLICATION TO THE U. S. SUPREME COURT FOR A WRIT OF CERTIORARI, AND TO BE CERTIFIED AS A PART OF SAID TRANSCRIPT, AND TO BE PRINTED AS A PART THEREOF, AND OBJECTIONS TO AND MOTION TO STRIKE PARTS FROM SAID PROPOSED TRANSCRIPT—Filed Dec. 19, 1935

To the Clerk of the Supreme Court of the State of California:

Alfred Spencer, the respondent in the above entitled matter, hereby requests that you prepare and certify to the Supreme Court of the United States the hereinafter designated portions of the transcript of record in the above case now lodged in your Court which are additions and/or amendments to that portion of the record heretofore designated by George S. Beadle as appellant and petitioner herein in his Præcipe filed with you on December 9, 1935, which portions of said record of your court should be in- [fol. 219] serted in the proposed transcript as heretofore made up in accordance with petitioner's said Præcipe; and strike from said proposed transcript the following, to-wit:

Add the Following Parts of Reporter's Transcript

Alfred Spencer:

Commencing at page	Commencing at line	Ending at page	Ending at line
49	4	49	19
51	6	51	7
67	5	67	7
103	8	103	9
103	24	103	26
104	15	104	26
106	2	106	12
126	1	126	17
132	11	132	14
175	2	176	24
186	15	186	15
312	15	312	17
313	4	317	16
315	13	315	16
347	8	347	17
365	13	365	25
392	2	393	11
426	15	429	3
734	7	735	8
789	8	790	1

Walter Paul:

450	22	451	6
451	11	451	23
452	9	452	11
458	1	458	4
459	13	460	3
463	10	463	18
480	19	481	3
491	5	492	5
492	18	493	1
519	22	520	7

George S. Beadle:

523	4	523	24

Parts of Reporter's Transcript—Continued

John Samuelson:

Commencing at page	Commencing at line	Ending at page	Ending at line
683	1	683	16
688	10	688	15
690	24	691	2

[fol. 220]

William Vartnaw:

599	25	601	14
604	7	604	8
617	6	617	9
620	6	620	9
639	25	640	8
646	16	647	5
648	9	649	4

August Kruse:

712	14	714	21
716	7	716	13
717	12	718	4
719	23	719	23
720	10	721	19
725	6	725	9
727	5	727	10
728	10	728	13

Paul Thorn:

764	1	765	6
767	13	768	14
773	7	773	25
778	9	779	9
779	26	780	12

John Delaney:

745	4	745	16
748	4	748	6
748	21	749	14
749	25	750	8
751	14	751	18

Excerpt from Argument of Plaintiff's Counsel as to Diagram:

815a	9	815f	10

Add to and insert in:

"Instructions given by the Court of its own motion:"

Instruction No. XV, commencing at page 826 line 10 and ending at page 827 line 3.

Instructions No. XXVIII and XXIX, commencing at page 832 line 17 and ending at page 833 line 1.

Add to and insert in:

"Instructions requested by the Defendant and given by the Court as amended:"

Instruction No. III, commencing at page 838 line 11 [fol. 221] and ending at page 838 line 36.

Instruction No. V, commencing at page 839 line 14 and ending at page 839 line 23.

Strike Out the Following Parts of Proposed Transcript

a. That fragmentary portion of opening statement of plaintiff's counsel on page 18 of said proposed transcript line 18 to page 19 line 5 on the ground that same is not evidence in the cause.

b. The opinion of the District Court of Appeal of the State of California made December 28, 1934 set forth on page 146 of said proposed transcript requested in Petitioner's Præcipe as item 14; on the ground that said opinion is of no legal force or effect as it was set aside and superseded by the opinion of the Supreme Court of the State of California, requested as item 15 of said Præcipe, which opinion is included in said proposed transcript.

c. Defendant's proposed instruction numbered V, page 140 line 20 to page 140 line 26 of Petitioner's proposed transcript on the grounds that defendant and appellant has never assigned such omission to give such instruction as error and has not briefed or argued any objections in the Appellate Court to the omission to give such instruction.

d. Defendant's proposed instruction numbered VII, at page 141 line 6 to page 141 line 18 of Petitioner's proposed transcript on the same grounds.

[fol. 222] e. Defendant's proposed instruction numbered IX, at page 142 line 1 to page 142 line 19 of Petitioner's proposed transcript on the same grounds.

f. Defendant's proposed instruction numbered XVI, at page 144 line 13 to page 144 line 22 of Petitioner's proposed transcript on the same grounds.

Insert affidavit of A. Don Duncan regarding failure to object to omission to give said instructions, and regarding diagram, filed December 19, 1935.

Dated San Francisco, California, December 19, 1935.

A. Don Duncan, Attorneys for Plaintiff and Respondent Alfred Spencer. John L. McNab, of Counsel.

[fol. 223] Receipt of a copy of within Præcipe Designating Parts of Record to be Incorporated in Petitioner's Proposed Transcript and to be Printed as a Part Thereof, is admitted this 19th day of December, 1935.

Harold M. Sawyer, Attorneys for Defendant and Petitioner.

Receipt of a copy of Additional Parts of Record to be Inserted in Appellant's Proposed Transcript on Application for Writ of Certiorari to the U. S. Supreme Court, and to be Printed as a Part Thereof, is admitted this 19th day of December, 1935.

Harold M. Sawyer, Attorneys for Defendant and Petitioner.

[fol. 224] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 17, 1936

The petition herein for a writ of certiorari to the Supreme Court of the State of California is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 676

GEORGE S. BEADLE,

Petitioner,

vs.

ALFRED SPENCER.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

George S. Beadle respectfully petitions this Honorable Court for a writ of certiorari to the Supreme Court of the State of California to review a judgment of the court pronounced on September 3, 1935, reported in 48 Pac. (2d) 678 (R. 102). The said court by its judgment affirms a judgment of the Superior Court of the State of California in and for the City and County of San Francisco for damages in favor of respondent and against petitioner and reverses a judg-

ment of the District Court of Appeal of the State of California, First Appellate District, Division One, pronounced December 28, 1934, reported in 40 Pac. (2d) 273 (R. 99), to which court an appeal was taken from the said Superior Court. Neither decision is reported officially as yet. Within the time specified by Rule XXX of the Supreme Court of the State of California, petitioner made application for a rehearing, which was denied by said Supreme Court on October 3, 1935 (R. 106), and in accordance with said Rule XXX said judgment of the said Supreme Court, pronounced September 3, 1935, became final at the end of the thirtieth day after the date of pronouncement, to-wit, on October 3, 1935.

Nature of Case and Questions Involved.

This is an action brought by respondent to recover damages for injuries sustained while he was employed by petitioner as a seaman on the vessel "Fort Bragg" which, at the time of the injuries, was lying moored to a dock at Vallejo, California, and engaged in discharging a cargo of lumber. The action was brought pursuant to the provisions of the statutes of the United States commonly known as the Jones Act (41 Stat. 1007; 46 U. S. C. A., Sec. 688), which in turn incorporates by reference what is popularly known as the Federal Employers' Liability Act (35 Stat. 65; 45 U. S. C. A., Secs. 51 to 59). The fourth section of the Federal Employers' Liability Act (35 Stat. 66; 45 U. S. C. A., Sec. 54), preserves to the employer the defense of assumption of the risk. Four questions are presented by the record:

First. In an action brought under the Jones Act by a seaman, who is not under articles and may quit his employment at any time without penalty or forfeiture, in which the employer pleads the defense of assumption of the ordi-

nary risks and hazards of the employment and supports the defense by evidence tending to prove that the risks in the instant case were ordinary and obvious hazards of the employment, well known to and appreciated by the seaman, is not the employer entitled to have the jury instructed upon the defense of assumption of the risk of ordinary and obvious hazards and the legal effect thereof?

Second. In such an action and under such circumstances, can the court so instruct the jury upon the issue of negligence as to withdraw completely from their consideration the issue of assumption of the risk of ordinary and obvious hazards?

Third. In such an action and under such conditions, where the negligence charged consists of furnishing an unsafe place to work, has the court a right to instruct the jury on this issue to the effect that they may take into consideration all of the circumstances of the case when those circumstances involve in part conditions which do not, as a matter of law, constitute negligence and which were not and could not have been the proximate cause of the injuries sustained?

Fourth. Is it not incumbent upon a seaman claiming damages under the Jones Act to establish negligence and causal connection between this and the injury?

The Reasons Relied Upon for Allowance of a Writ of Certiorari.

Respondent, a seaman employed on the "Fort Bragg," a coastwise vessel, was injured aboard the ship while unloading part of a deckload of lumber at a dock at Vallejo, California, and fell from his place of work into an open hold. He brought this action for damages against both Beadle Steamship Company, Ltd. and George S. Beadle,

under the terms of the Jones Act (Plaintiff's Opening Statement, R. 13). At the trial a non-suit was granted as to the defendant, Beadle Steamship Company, Ltd., a corporation, from which no appeal was taken, and it is consequently eliminated from the case. The jury returned a verdict against the petitioner, George S. Beadle, for $10,000.00, which the trial court reduced to $7,000.00 on motion for a new trial (R. 10).

The amended complaint alleged that respondent suffered numerous injuries of a serious nature through the negligence of petitioner in failing to provide respondent with a reasonably safe place to work. The particulars in which petitioner failed in this duty are alleged to be in piling slingloads of lumber on the deck next to the open hold of the vessel without piling or properly securing the lumber, and failing to provide safeguards around the hold; that as a result of this negligence certain lumber gave way under respondent as he was attempting to fasten a loading sling under a slingload of this lumber, precipitating him into the hold (R. 2-3).

Petitioner's answer denied negligence and set up as an affirmative defense assumption of the risk of ordinary and obvious hazards (R. 6-7). Instructions on the issue of assumption of the risk of ordinary and obvious hazards were requested by petitioner (Instructions Nos. II, IV (R. 94), and No. XI (R. 97)). All of these instructions were refused and no instruction whatever was given upon the issue of assumption of the risk, apparently on the theory that such defense was not open to petitioner in a case of this character.

The evidence in support of the issue of assumption of the risk disclosed the following facts: Respondent was not an articled seaman but, on the contrary, was employed substantially at will and could quit voluntarily without

penalty or forfeiture except that there would be three days delay in giving him his pay (R. 14, 45). If he was discharged for disobedience he had to be paid immediately (R. 45). He was paid just like a land employee and signed the payroll (R. 51). The ship's hold was open, which fact was admittedly known to respondent, who made no protest concerning this condition (R. 30, 32). In fact he assisted in removing the hatch covers at San Francisco before the ship sailed for Vallejo (R. 47). The lumber on which he was working was so close to the open hold that if he fell he would almost certainly fall down into it. When discharging, it is not practical to keep the hatches closed because lumber in the hold may be wanted (R. 71), and there is no method of knowing in advance when the need for discharging from the hold may arise (R. 70). Respondent also knew that no safety lines or other safeguards were present to prevent him falling into the hold should he slip from his place of work (R. 31, 50). There was evidence given on behalf of petitioner that he was standing at the time he fell, on hand stowed lumber of the dimension of 1" x 12" (R. 87), and hand stowed or piled lumber is, according to respondent, good and proper stowage (R. 24). He was at the time of his injury pursuing a method of work in disobedience of specific orders and instructions (R. 53, 59, 60, 61, 82). There were other and safe ways of performing the operation in which respondent was engaged at the time he fell (R. 58, 59). There were appliances called pick-up hooks (R. 58), which could have been used, available aboard the vessel (R. 55), and which respondent did not use. Respondent had been a seaman since 1908 (R. 13), was thoroughly experienced, had made other voyages on the "Fort Bragg" and other lumber carriers, and had had at least seven or eight years' experience in loading and discharging lumber carriers (R. 43).

Instructions on all of these issues were tendered by petitioner (Instruction No. VII, R. 95; Instruction No. XI, R. 96; Instruction No. VIII, R. 95, Instruction No. II, R. 94; Instruction No. VI, R. 95; Instruction No. XIX, R. 98). All were refused by the court and no equivalents were given.

In view of this evidence, the District Court of Appeal held that petitioner was entitled to have the jury instructed on the theory of assumption of the ordinary and obvious risks of the employment and that the trial court's refusal to do so was reversible error. Accordingly, it reversed the judgment. (Opinion of the District Court of Appeal, R. 101.) The Supreme Court of California held that "the facts do not present such a case as without question entitles the defendant to instructions on the question of assumption of risk and the withholding of instruction on that question, if error, was not prejudicial to him" (R. 105-106). It, therefore, affirmed the judgment.

Petitioner also requested an instruction to the effect that the open hold could not be the proximate cause of the respondent's injuries (Instruction No. XIV, R. 97). This instruction was refused and instead thereof the court, of its own motion, gave its Instruction No. XV-a (R. 91) and Instructions No. III (R. 89), No. IX (R. 90), both requested by respondent, and No. II (R. 91). This last instruction had been prepared by petitioner, but was amended by the court, as appears from the record. The effect of these four instructions was three-fold. In the first place it permitted the jury to take into consideration the open hold as an element of negligence, whereas it is not negligence as a matter of law to have the holds open when vessels are loading and discharging.

The Gladiolus, 21 Fed. 417;
Smith v. *United States,* 18 F. (2d) 110.

In the second place, these instructions allowed the jury to find that the open hold constituted the negligence which proximately caused the respondent's injuries. And lastly, these instructions completely withdrew from the jury all questions of assumption of the risk because the jury was permitted to consider the ordinary and obvious hazard of the open hold as an element of negligence.

In actions brought under the Federal Employers' Liability Act, it has been held by this Court that proof of negligence alone does not entitle the plaintiff to recover. The negligence complained of must be the cause of the injury.

Chicago, Milwaukee & St. Paul R. R. v. *Coogan*, 271 U. S. 472, 70 L. Ed. 104;

Northwestern Pacific R. R. Co. v. *Bobo*, 290 U. S. 499, 78 L. Ed. 462.

In respondent's opening statement his counsel said the lumber upon which he was standing "toppled with him and some of the lumber fell over with him, threw him down off this narrow shelf into the open hold" (R. 13). Respondent himself confirms this statement by testifying that the lumber upon which he was standing, "the outer tier gave way, shifted," thus causing him to lose his balance and fall into the hold (R. 42). Obviously, therefore, the negligence, if any, which proximately caused him to fall, has to do with the failure to furnish him with a secure foundation upon which to work. The fact that the hold was open was not negligence, and neither was it the proximate cause that made the respondent fall. Yet the court, by its Instructions Nos. III (R. 89), IX (R. 96), and XV-a (R. 91), told the jury that they might in effect take into consideration in determining both the issues of negligence and proximate cause, the circumstance of this open hold.

This Court has not directly passed upon the applicability of the defense of assumption of the ordinary risks and hazards of the employment in any case brought under the Jones Act. The decision of the Supreme Court of the State of California on the Federal questions of substance presented by this record, is not in accord with the applicable decisions of this Court. The Supreme Court of California has, in substance and effect, emasculated the fourth section of the Federal Employers' Liability Act, and has denied the applicability of the defense of assumption of the ordinary risks and hazards in cases arising under the Jones Act. It has decided in this case Federal questions of substance in complete disregard of the controlling decisions of this and the lower Federal Courts. It is submitted that to permit this California decision to stand would cause confusion and uncertainty in future actions in California brought under the Jones Act, and would destroy the uniformity of the maritime law and of the application of the act throughout the United States.

Brief.

A brief in support of this petition is filed herewith.

Prayer.

WHEREFORE your petitioner prays that this Honorable Court will be pleased to issue its writ of certiorari to the Supreme Court of the State of California, commanding said court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the records and all proceedings in the case numbered and entitled in said court: "No. SF-15,384, Alfred Spencer, plaintiff, *vs.* Beadle Steamship Company, Ltd., a corporation, and George S. Beadle, defendants, George S. Beadle, defendant and appellant," to the end that said case may be reviewed and determined by this Court as provided by

law, and that said judgment of said Supreme Court of the State of California may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just.

Dated San Francisco, California, December 23, 1935.

HAROLD M. SAWYER,
Attorney for Petitioner.

Certificate of Counsel.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Harold M. Sawyer, being first duly sworn, upon his oath deposes and says: That he is the attorney for the petitioner in the above and foregoing cause; that he has read and considered the foregoing petition for writ of certiorari, together with the hereinafter contained supporting brief, and is familiar with the contents of such petition and brief, and in affiant's judgment such petition is well founded; that this petition is presented in good faith, and the same is not interposed for delay.

HAROLD M. SAWYER,

Subscribed and sworn to before me this 23rd day of December, 1935.

[SEAL.] LULU P. LOVELAND,
Notary Public in and for the City and County of San Francisco, State of California.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 676

GEORGE S. BEADLE,

Petitioner,

vs.

ALFRED SPENCER.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

Upon appeal from the judgment on the verdict to the District Court of Appeal of the State of California, First Appellate District, Division One, that court wrote an opinion which is reported in 40 Pac. (2nd) 273 (R. 99-102). Petition for hearing in the Supreme Court of the State of California was granted and that court filed an opinion on September 3, 1935, which is reported in 48 Pac. (2nd) 678 (R. 102-106). Neither opinion is as yet officially reported.

II.

Jurisdiction.

1. The date of the judgment sought to be reviewed is September 3, 1935, and the date of the denial of the petition for rehearing in the Supreme Court of the State of California is October 3, 1935. Under Rule XXX of the Rules of the Supreme Court of California, a judgment of that court does not become final until the end of the thirtieth day after the date of pronouncement. The petition for rehearing was denied on the same day the judgment became final.

2. Your petitioner submits that this Honorable Court should review the decision of the Supreme Court of the State of California for the reasons relied upon in the foregoing petition, pages 3 to 9 hereof, which, in the interests of brevity, are not here repeated.

3. The jurisdiction of this Honorable Court is invoked under the provisions of the Judicial Code, Section 237, as amended by the act of February 13, 1925, 43 Stat. 938; 28 U. S. C. A. Sec. 344, subsection (b) thereof, wherein provision is made for certiorari to review a final judgment rendered or passed by the highest court of a state in which a decision could be had, where any title, right, privilege or immunity is especially set up or claimed by either party under a statute of the United States. The statute under which petitioner claims a right which has been denied to him is commonly known as the Jones Act, 41 Stat. 1007; 46 U. S. C. A. Sec. 688, in which is incorporated by reference the statute commonly known as the Federal Employers' Liability Act, 35 Stat. 65; 45 U. S. C. A. Secs. 51 to 59.

Section 237 of the Judicial Code, the Federal Employers' Liability Act and the Jones Act may be found in full in the Appendix to this brief.

4. The following cases are believed to sustain the jurisdiction of this Honorable Court:

Pryor v. *Williams*, 254 U. S. 43, 65 L. Ed. 120, certiorari granted;

Chicago, Milwaukee & St. Paul Ry. Co. v. *Coogan*, 271 U. S. 472, 70 L. Ed. 1041, certiorari granted;

Pacific Steamship Co. v. *Peterson*, 278 U. S. 130, 73 L. Ed. 220, certiorari granted;

Northwestern Pacific R. R. Co. v. *Bobo*, 290 U. S. 499, 78 L. Ed. 462, certiorari granted.

III.

Statement of the Case.

A summary statement of the case appears in the petition filed herewith but for the sake of completeness and in order to comply with subsection (d) of Section 2 of Rule 27 of this Court, the following statement is made:

Respondent, a seaman employed on the vessel "Fort Bragg", a coastwise vessel engaged in the carriage of lumber, was injured aboard the ship while unloading part of a deckload of lumber on to a dock at Vallejo, California.

The respondent was an able-bodied seaman, knowing no other vocation. He had been a seaman since 1908 (R. 13), and at the time of the alleged injuries he was forty years of age (R. 30-31), and had had eight years of experience on lumber vessels (R. 43).

The "Fort Bragg" was a single-ended steam schooner 188 feet in length (R. 52), engaged in the coastwise trade, carrying lumber below and on deck, a general cargo in the hold (R. 34), and petroleum products in large upright steel tanks set on her deck for that purpose. She had only one hatch equipped with gear fore and aft (R. 85). The hatch was surrounded by the usual hatch coamings, about two and

a half feet high (R. 64), and outboard of the coamings, running fore and aft along the deck, were heavy structural timbers known as "stringer pieces."

At the forward and after end of the hatch were two oblong upright tanks extended outboard from the square of the hatch for a distance of a little more than three feet. The distance from the port coaming to the port rail was about eight feet (R. 18, 19, 20).

While in the Columbia River district, the vessel had loaded lumber of various sorts on deck and in the hold, consigned to Vallejo and Mare Island (R. 72). She had also taken on 100 pieces of timber 12 x 14 inches, 52 feet in length (R. 52). The space between the two tanks fore and aft was only 45 feet, insufficient to accommodate the length of the timbers (R. 75). Consequently they were placed between the tanks and the rails and flush with the ship's sides.

After the timbers were in place, a space remained between the tanks and the hatch coamings, about 45 feet in length and about 40 inches wide (R. 21-22). Lumber was laden in this space at Coos Bay (R. 67). Bundles of laths were first stowed in this space even with the top of the hatch coamings (R. 64). On top of these laths, 1 x 12 lumber on the port side had been stowed in by hand, one piece at a time, above the hatch coamings as high as the men could reach (R. 68), and then other lumber was landed on top of the hand stowed lumber and left in slingloads as it came from the dock without being piled piece by piece, as was the lumber underneath (R. 68).

On May 4, 1931, which was a Monday, the "Fort Bragg" lay at a dock at Vallejo, California, having come from San Francisco the preceding Saturday. Somewhere in the neighborhood of nine o'clock in the morning of Monday, the respondent was working on the deckload on the port side forward and next to the hatch on the lumber between the

hatch coaming and the heavy 52 foot timber (R. 52). While attempting to place a cargo sling around a slingload of lumber and while standing on hand stowed lumber (R. 87), he fell into the hold of the vessel.

At the time the respondent fell he was up some distance above the hatch coamings, about four or five feet (R. 89). He and his partner, Walter Paul, were preparing one of the landed loads, (*i.e.*, a slingload stowed as it came from the dock), of lumber to be slung ashore in ship's tackle. The hatch covers were off of the hold at this time (R. 70), and had been since the vessel arrived in San Francisco the preceding week.

There was lumber in the hold to be discharged at Vallejo but at the time of and during the hour or so of work prior to the time of the accident, no cargo was being or had been taken from the hold (R. 70, 72). All the lumber on deck and in the hold, with the exception of some for Mare Island, was consigned to the Vallejo Lumber Company at Vallejo, California (R. 73). Neither the chief mate nor the captain of the vessel knew when the lumber in the hold consigned to Vallejo was to be unloaded (R. 70, 74). Up until the time of the accident, no order had yet been received by the vessel to discharge the lumber in the hold (R. 73), but all the lumber consigned to Vallejo on deck and in the hold was subject to the call of the consignee at any time (R. 74).

After the vessel had moved to Vallejo on Saturday and the crew had knocked off Saturday afternoon (R. 34-35), a line was stretched around the edge of the deckload to prevent persons coming aboard the vessel at night from falling into the hold (R. 30). Before the crew turned to on Monday morning, this line was removed (R. 31). It was impractical to discharge the deckload with such a line in place (R. 50).

It will be noted from the specific acts of negligence alleged (R. 2-3), and the opening statement (R. 13), that re-

spondent attributed his fall into the hold to the fact that some of the lumber under his feet shifted or toppled and that this occurred because the lumber he was standing on was a landed slingload, as distinguished from stowed or hand piled lumber.

Lumber that is hand piled is taken piece by piece and laid down one piece on top of another until the lumber has been built up for a distance of 12 inches. Laths are then placed across the lumber at intervals. The lumber is then built up for another 12 inches and the laths are put in as before (R. 67, 68). A landed slingload is one that is put on the ship just as it comes from the dock (R. 27, 38-39). Slingloads are not all alike. They all have laths or binders between the pieces of lumber but some have more than others.

In support of his contention respondent testified that the lumber he was standing on was a landed slingload; that it was stowed lumber, and that he didn't know what it was (R. 44, 46). Petitioner's witness testified that the lumber respondent was standing on at the time he fell was hand stowed 1 x 12 (R. 78, 87).

Respondent also testified that he and his partner were preparing to take out a landed slingload. Respondent first placed a light wire sling, called a pick-up sling, underneath the forward end of the load and the forward end of the load was then raised up by the falls from the forward winch. The purpose of this was to enable the respondent to place around the load a heavier sling known as a cargo sling, which would then be pulled midships of the load by respondent's partner, Paul, who meantime was standing on top of the load that was in the pick-up sling (R. 40-42).

Respondent pushed one end of the cargo sling under the upraised end of the load from the outboard side towards the hatch and was either reaching for the end of the sling next the hatch or pulling it out to hand to his partner when

he slipped, lost his balance, the outer tier of lumber shifted or gave way, or some lumber turned under his foot (R. 40-42, 49).

Plainly, the reason why respondent fell was because the edge of the deckload shifted or gave way under his feet or because he was performing his work in an unskillful manner. It was therefore incumbent on the respondent to show negligence in the stowage of the deckload at the point where the accident occurred. He attempted to do this by submitting some evidence that the deckload at the point from which he fell was a landed slingload of lumber and that it was customary to hand pile the lumber at the edge of deckloads.

Negligence was charged in several particulars set forth in the amended complaint (R. 2-3), but the issue of negligence really came down to the safety of the place of employment and what it was that caused the respondent to fall. Was it because he was standing on a landed slingload of lumber, or was he, at the time he fell, standing on lumber which had been hand piled? This last question became the subject of ultimate inquiry as far as the issue of negligence is concerned. The answer denied negligence and set up as an affirmative defense the assumption of the ordinary and obvious hazards of the employment (R. 6-7).

The evidence in support of the issue of assumption of the risk disclosed the following facts: Respondent was not an articled seaman but, on the contrary, was employed substantially at will and could quit voluntarily without penalty or forfeiture except that there would be three days delay in giving him his pay (R. 14, 45). If he was discharged for disobedience he had to be paid immediately (R. 45). He was paid just like a land employee and signed the payroll (R. 51). The ship's hold was open, which fact was admittedly known to respondent, who made no protest concerning this condition (R. 30, 32). In fact he assisted in

removing the hatch covers at San Francisco before the ship sailed for Vallejo (R. 47). The lumber on which he was working was so close to the open hold that if he fell he would almost certainly fall down into it. When discharging, it is not practical to keep the hatches closed because lumber in the hold may be wanted (R. 71), and there is no method of knowing in advance when the need for discharging from the hold may arise (R. 70). Respondent also knew that no safety lines or other safeguards were present to prevent him falling into the hold should he slip from his place of work (R. 31, 50). There was evidence given on behalf of petitioner that he was standing, at the time he fell, on hand stowed lumber of the dimension of 1″ x 12″ (R. 87), and hand stowed or piled lumber is, according to respondent, good and proper stowage (R. 24). He was, at the time of his injury, pursuing a method of work in disobedience of specific orders and instructions (R. 53, 59, 60, 61, 82). There were other and safe ways of performing the operation in which respondent was engaged at the time he fell (R. 58, 59). There were appliances called pick-up hooks (R. 58), which could have been used, available aboard the vessel (R. 55), and which respondent did not use. Respondent had been a seaman since 1908 (R. 13), was thoroughly experienced, had made other voyages on the "Fort Bragg" and other lumber carriers, and had had at least seven or eight years experience in loading and discharging lumber carriers (R. 43).

IV.

Specification of Errors to be Urged.

1. The Supreme Court of California erred in holding that in a case brought under the Jones Act by a seaman employed on a coastwise vessel in the lumber trade not

under articles and not acting under compulsion, to recover damages for injuries sustained by him as a result of falling into the hold of a vessel engaged in discharging cargo at a dock, where the defense of assumption of the ordinary risks and hazards of the employment had been pleaded and evidence in support thereof had been given, it was not reversible error for the trial court to refuse all instructions on that issue tendered by petitioner.

2. The Supreme Court of California erred in holding that in such a case where the negligence charged was furnishing the respondent an unsafe place to work, the defense of assumption of the ordinary risks and hazards of the employment is not available to the employer.

3. The Supreme Court of California erred in holding that in such a case where there was evidence that respondent had adopted a dangerous method of work when there was a safe method available to him, it was not reversible error to refuse to give an instruction tendered on that issue by petitioner to the effect that respondent assumed the risk of any injury proximately caused by such dangerous method and could not recover.

4. The Supreme Court of California erred in holding that in such a case where there was evidence that the respondent was performing his work in a manner contrary to specific instructions given him in that regard, it was not reversible error to refuse to give an instruction tendered on that issue by petitioner to the effect that respondent had assumed the risk of injury proximately caused by, and sustained while, acting in disobedience of instructions and could not recover.

5. The Supreme Court of California erred in holding that in such a case where there was evidence that the respondent was injured by falling into an open hold when the vessel was engaged in discharging cargo, it was not

reversible error to refuse to give an instruction tendered on that issue by petitioner to the effect that respondent assumed the risk of injury proximately caused by falling into such hold and could not recover.

6. The Supreme Court of California erred in holding that in such a case where there was evidence to support the defense of assumption of the ordinary risks and hazards of the employment, it was not reversible error to refuse to give an instruction on the legal effect of assumption of the risk, namely, that if proven it was an absolute defense and respondent could not recover.

7. The Supreme Court of California erred in holding that in such a case where there was evidence that the respondent was injured by falling into an open hold when the vessel was engaged in discharging cargo; it was not reversible error to refuse to give an instruction tendered on that issue by petitioner to the effect that the maintenance of an open hold during discharging was not negligence and could not be considered as such.

8. The Supreme Court of California erred in holding that in such a case it was not reversible error to refuse an instruction tendered by petitioner to the effect that respondent's injury could not have been proximately caused by the existence of an open hold.

9. The Supreme Court of California erred in holding that in such a case it was not reversible error to instruct the jury that in determining whether or not the employer had furnished a safe place of work the jury must consider not one condition alone at the time and place, but the whole situation as presented by the evidence at the time of the accident.

V.

Summary of Argument.

1. Under the applicable decisions in actions brought under the Federal Employers' Liability Act, the defense of assumption of the ordinary and obvious hazards of the employment is reserved to the employer by the fourth section of the Act.

2. The Jones Act confers upon seamen all the rights and remedies of railroad employees in interstate commerce and specifically incorporates the Federal Employers' Liability Act by reference.

3. In an action under the Jones Act brought by a seaman who was injured by falling into an open hold and who, at the time of his injury, was not acting under compulsion, and who was engaged in discharging lumber cargo from a vessel to a dock, the defense of assumption of the ordinary and obvious hazards of the employment is preserved to the maritime employer and if the defense is pleaded and evidence in support thereof introduced, the jury should be instructed on the legal effect of the defense that it is a complete defense and a bar to recovery if made out.

4. In the instant case the defense was pleaded. The evidence shows knowledge and appreciation of the ordinary and obvious hazards of his employment by a seaman of long standing, especially experienced in the stowing and discharging of lumber cargoes on Pacific Coast coastwise ships engaged in the lumber trade.

The evidence shows knowledge of an open hold in close proximity to the place of work; adoption of a dangerous method of work when safe methods could have been pursued; injury occurring as a result of disobedience of specific instructions given for respondent's safety not more than an hour previous to the injury.

5. All of these circumstances supported appropriate instructions involving the defense of assumption of the ordinary and obvious hazard of the employment. Such instructions were tendered by the petitioner and refused and no equivalent was given.

6. Instructions upon negligence and proximate cause given were so confused as to make it imperative for the jury to find the existence of an open hold negligence whereas it is not so as a matter of law, and further to find it the proximate cause of respondent's injuries when it could not be such in fact, and to disregard completely the issue of assumption of the risks of the ordinary and obvious hazards of the employment.

7. The refusal of the instructions tendered and the giving of the confused instructions on negligence and proximate cause resulted in the complete and prejudicial denial of petitioner's rights under the Jones Act, and the decision of the Supreme Court of California which brought about this result should be reviewed on certiorari and reversed.

VI.

ARGUMENT.

Before addressing our attention to the Specifications of Error, it may be well to call the attention of the court to the fact that *Section 647 of the California Code of Civil Procedure* provides in part that "giving an instruction although no objection to such instruction was made," and "refusing to give an instruction," or "modifying an instruction requested, are deemed to have been excepted to." Furthermore, the appeals in this case did not arise upon a bill of exception, but by the alternative method of a typewritten transcript provided for in Section 953a of the Code of Civil Procedure.

All of the errors complained of in this brief and accompanying petition were properly raised under California practice, and some, at least, were considered by the courts below. In this connection we call attention to an affidavit made by A. Don Duncan on the 19th day of December, 1935, found at the end of the additional record called for by respondent's Praecipe to the Clerk of the California Supreme Court, in which it is stated that Instruction No. V (R. 95), Instruction No. VII (R. 95), Instruction No. IX (R. 96), and Instruction No. XVI (R. 98) were not incorporated in petitioner's brief in the courts below in connection with the argument pertaining to them. An affidavit in answer to Mr. Duncan's affidavit, made by Webster Street on the 20th day of December, 1935, can be found in the Appendix to this brief. It appears from the affidavit of Mr. Street that no error is predicated in this brief upon Instruction No. V, Instruction No. IX, and Instruction No. XVI. Error is predicated upon Instruction No. VII, and is raised by the Third Specification of Error. It appears from Mr. Street's affidavit that Instruction No. VII was printed in full in the original brief of petitioner in the District Court of Appeal of California, and that an argument demonstrating the error arising from a refusal to give this instruction was made in that brief.

An implication is sought to be made by respondent that the underlined portion of the statement by counsel of defendant and appellant in appellant's opening brief, page 106, amounts to a waiver of all error predicated upon a refusal to instruct upon the issue of assumption of the ordinary risks and hazards of the employment. This implication is squarely negatived by Mr. Street's affidavit and the fact that the lower courts split on this issue.

First and Second Specifications of Error.

The Refusal to Give Any Instruction At All Upon Assumption of the Risk.

This is the vital issue in this case. The failure to give any instruction on the assumption of the risk was the reason why the District Court of Appeal of the State of California, First Appellate District, Division One, reversed the judgment of the trial court (R. 101). On the other hand, because it was of opinion that no such instructions were necessary under the facts in this case, the Supreme Court of California reversed the District Court of Appeal and affirmed the judgment below (R. 104-105).

There can, therefore, be no doubt of the significance and extent of the Supreme Court's opinion. It holds squarely and without supporting authority that when the issue of negligence in actions under the Jones Act is presented to the jury the trial court may, notwithstanding the evidence upon the question, withdraw the issue of assumption of ordinary risks of the employment from the jury's consideration. It is submitted this is not and never has been the law, nor can it be justified in the present case upon the ground that the particular issue of negligence was whether the petitioner had furnished the respondent with a reasonably safe place to work. In the last analysis, the only issue presented to the jury was whether the petitioner was or was not negligent, and no matter how this issue was determined, the petitioner was under the law entitled to have the issue of assumption of ordinary risks presented to the jury.

This action was brought under the Jones Act, which gives to seamen the rights and remedies available to employees in interstate commerce under the Federal Employers' Liability Act. The fourth section of that act preserves to the employer the defense of assumption of the ordinary risks

and hazards of the employment. In actions arising under the Federal Employers' Liability Act, this court has repeatedly held that the defense of assumption of the risk has been preserved by the act.

Seaboard Airline Ry. v. *Horton,* 233 U. S. 492, 58 L. Ed. 1062;
Pryor v. *Williams,* 245 U. S. 43, 65 L. Ed. 120;
Northwestern Pacific Ry. Co. v. *Bobo,* 290 U. S. 499, 78 L. Ed. 462.

Upon the authority of *Pryor* v. *Williams, supra; Southern Railway Co.* v. *Hermans,* 44 F. (2d) 366, and *Holy Cross Gold Mining Co. et al.* v. *O'Sullivan,* 270 Colo. 237, 60 Pac. 570, the District Court of Appeal held that in the instant case, under the pleadings and the evidence, the jury should have been instructed with regard to the defense of assumption of ordinary risks and hazards of the employment and the legal effect thereof (R. 101), and because of the failure to so instruct, reversed the judgment of the trial court.

It has been repeatedly urged throughout this litigation that the above authorities involve injuries sustained in the operation of railroads, and that consequently these authorities furnish no rule whatever for the application of the doctrine of assumption of the risk of the ordinary and obvious hazards in the case of seamen suing under the Jones Act.

Long before the Jones Act was passed, this Court said, in the case of *The Iroquois,* 194 U. S. 240, 48 L. Ed. 955:

> "A seafaring life is a dangerous one. Accidents of this kind are peculiarly liable to occur and the general principle of law that a person entering a dangerous employment is regarded as assuming the ordinary risks of such employment is peculiarly applicable to the case of seamen."

There can be no doubt that the defense of assumption of the risk in suits brought by seamen prior to the passage of the Jones Act was available to their employers.

It is true that some of the inferior Federal and State courts have held that the entire doctrine of assumption of the risk is not applicable to seamen because of the peculiarities of their occupation which distinguish it from land occupation. The chief distinction between the two occupations is that the seaman at sea is acting under orders, disobedience to which may imperil the safety of vessel, persons on board, and the cargo. But in this case the respondent occupied no such position. He was on a vessel moored at a dock discharging cargo. He was injured early on Monday morning, having been ashore since the preceding Saturday afternoon. He had not signed articles and could have quit his job at any time he liked without penalty or forfeiture (R. 14, 45, 51). Under these circumstances there is no occasion for relaxing the rule of assumption of the risk because the reason upon which such relaxation is based does not exist. Other courts have found no difficulty in applying the rule of assumption of the risk in cases under the Jones Act where, as here, the seaman was not acting under compulsion. (*Skolar* v. *Lehigh Valley Ry. Co.*, 60 F. (2d) 893; *Scheffler* v. *Moran Towing & Transp. Co.*, 1934 A. M. C. 441).

It is therefore submitted that when Congress saw fit to enlarge the privileges of seamen by conferring upon them the same rights and remedies as were conferred upon employees in interstate commerce by the Federal Employers' Liability Act, it fully intended to reserve to the maritime employer the same defense of assumption of risk that had been reserved to the land employer.

The gist of the opinion of the Supreme Court of California, and the reason why it affirmed the judgment of the

trial court is quite apparent in the following passage of the court's opinion:

> "The important issue was whether the plaintiff was furnished with a reasonably safe place to work and whether there was evidence that the defendant was negligent in failing to provide such a reasonably safe place. The question was submitted to the jury on that basis, and we see no prejudicial error in the refusal of the court specifically to instruct the jury as to whether the plaintiff had assumed the risk" (R. 104-105).

This Court holds, therefore, that wherever the issue of negligence is presented in the form that the employer did not furnish a safe place to work, the defense of assumption of the risk is inapplicable, no matter what the testimony upon that issue may be.

There can be no doubt that the defense of assumption of the ordinary risks and hazards of the employment is preserved to maritime employers under circumstances such as existed in the instant case by the Jones Act and its incorporation of the fourth section of the Federal Employers' Liability Act.

It remains, therefore, to consider whether the evidence in this case was of such a character as to entitle the petitioner to an instruction on the issue of assumption of the risk.

The evidence has already been stated both in the petition accompanying this brief and in the statement of the case on page 13 of this brief. That evidence showed not only that the respondent was an experienced seaman, but also that he had had about eight years specialized experience in loading and discharging lumber vessels on the Pacific Coast. It also showed that there were certain ordinary

hazards of his employment with which he was entirely familiar and which he must have appreciated. Nothing could be clearer than that an open cargo hatch is one of the inevitable hazards of working upon a vessel which is discharging cargo. It is equally clear that the work of unloading deckloads upon the edge thereof in close proximity to the hatch involves the obvious hazard of falling off into the hold below. It is submitted that there was substantial and direct evidence from which the jury could have found that the lumber the respondent was standing on at the time he fell was hand-stowed lumber (R. 87-88). The risk of falling from such lumber was an ordinary incident of his employment.

Instructions covering the defense of assumption of the risk were tendered by the petitioner and refused (Instructions Nos. II and III, R. 94, and generally the instructions discussed in Specifications of Error 1 to 6, inclusive). The petitioner was entitled to instructions upon this issue and the failure to give them has deprived the petitioner of a substantial right accorded to him under the Jones Act and the Employers' Liability Act.

Third Specification of Error.

The Refusal of Instructions Concerning Choice of Methods of Work.

The evidence showed that the respondent was pursuing an unnecessarily dangerous method of work when other and safe ways were available to him.

This is but another phase of assumption of the risk. It is a well established principle of the law of master and servant and a principle applied in injuries to maritime workers, that if there are two ways, one safe and the other

dangerous, the servant chooses the dangerous way at his peril, if the difference is known to him.

Hardie v. *New York Harbor Drydock Corp.*, 9 F. (2d) 545;
Beulah Coal Co. v. *Verbrugh*, 292 Fed. 34;
Williams Cooperage Co. v. *Headrick*, 159 Fed. 34;
The Indrani, 101 Fed. 596.

Nor is the act of the servant in choosing the dangerous method to be considered as contributory negligence. The Supreme Court of California fell into this precise error and confused the principle of assumption of the risk with contributory negligence (R. 104). Although the two concepts seem often to overlap:

> "Whenever discrimination between them becomes necessary, the use of defective ways or works with notice of the defect and appreciation of the danger is held to be assumption of the risk and not contributory negligence." (*Seaboard Airline Ry. Co.* v. *Horton*, 233 U. S. 492, 503).

This rule applies to seamen as well as to other kinds of employees.

The Mandalay, 42 F. (2d) 437, 1930 A. M. C. 1390;
Holm v. *Cities Transp. Co.*, 60 F. (2d) 721;

where the court said:

> "Where the conduct of the injured seaman, however, is induced only by his own free will and he acts to his injury at a time and place when he is free to choose between doing what is safe and what is known to him to be dangerous, he is obviously under no more compulsion than is an employee on land."

The Romulus, 1926 A. M. C. 831, 833, where the court said:

> "These seamen, the libelant and Johansen, who were working with him, were able and skilled seamen and they were expected to use their experience and their skill in doing the work. It was not required of the ship that the ship should stand over these men and direct them exactly how they should do the work. That was a matter left to their judgment, their discretion and their experience, and so when they came to raise this ladder, the manner in which they desired to raise it was a matter left to their discretion and skill and they chose their own way in which to raise the ladder."

In *Crockett* v. *Bro[illegible]*, 271 Fed. 415, the seaman was apparently a seaman [illegible] the strict sense and although the court recognized the general rule that seamen constitute a peculiar class, it says:

> "We know of no rule in the maritime law which imposes upon the owner of a ship liability for an accident such as this. The unfortunate accident of which the plaintiff complains was the plaintiff's own manner of doing the work."

This rule is also followed under the Jones Act.

West Kentucky Coal Co. v. *Parker,* 229 Ky. 685, 17 S. W. (2d) 753;

The Mangore, 1933 A. M. C. 229.

Instructions on this precise issue, framed upon the authority of the above cases, were tendered by petitioner (Instruction No. VII, R. 95; Instruction No. XI, R. 97), and refused and no equivalent instruction was given.

Another phase of this same issue is presented by the evidence which showed that there were pick-up hooks aboard the "Fort Bragg" designed to be used in perform-

ing the precise operation in which respondent was engaged when he fell, and that the use of these hooks would have obviated any necessity for going inside the load and on to the extreme edge of the deckload as he did (R. 54-55).

This is but another phase of assumption of the risk and under the evidence on this issue the respondent assumed the risk.

The Mexoil, 25 F. (2d) 457;
Crockett v. *Brandt*, 271 Fed. 415.

Respondent has criticized these cases upon the ground that they did not arise under the Jones Act but, as was said in *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, the Jones Act did not materially change the maritime law.

In further support of the proposition that seamen may not recover for injuries caused by their failure to use appliances, see *The Mangore*, 1933 A. M. C. 229, an action in admiralty under the Jones Act. The charge of negligence was the failure to furnish the seaman with goggles while working with a hammer and chisel. A piece of metal struck him in the eye and since it appeared that goggles were available and he did not use them, recovery was denied.

The instructions already referred to under this heading were amply sufficient to cover this particular branch. They were tendered and refused and no equivalent instruction was given. Once more the petitioner was denied substantial rights accorded to him by the Jones Act.

Fourth Specification of Error.

Refusal of Instructions Concerning Disobedience of Instructions Given for Respondent's Safety.

There was evidence to the effect that in doing his work at the time he fell into the hold, the respondent was deliberately disregarding instructions given him about an hour

previously for his safety (R. 53, 59, 60, 61). He had been told not to go inside the load toward the edge of the deckload. Petitioner's witness, Kruse, testified that this was just what respondent was doing when he fell (R. 82).

This issue concerning the disobedience of instructions presents still another phase of assumption of the risk.

Grunert v. *Bush Terminal Co.*, 47 F. (2d) 565.

It has been contended by respondent that this case was not decided under the Jones Act. This, however, is palpable error. The case was a death case and could have been brought under no law other than the Jones Act. The general maritime law gives no right of action for wrongful death. (*United States* v. *Lindgren*, 281 U. S. 38, 74 L. Ed. 686.) The Death on the High Seas Act is obviously inapplicable to the situation and no local law is relied on by the court. Incidentally, in this case, as in the case at bar, the charge of negligence was furnishing an unsafe place to work, and yet the court held that the defense of assumption of the risk was available to the maritime employer under the Jones Act.

Instructions on this issue were tendered by petitioner (Instruction No. VIII, R. 95), and refused and no equivalent instruction was given. This was the denial of another right given to petitioner by the Jones Act.

Fifth Specification of Error.

Refusal to Instruct that Maintenance of Open Holds During Loading and Discharge of Vessel is One of the Ordinary and Obvious Risks Assumed by Seamen.

The evidence showed that respondent was working on the edge of a deckload about four and a half feet above the hatch coamings (R. 89), and that the hatch coamings were two and a half feet high (R. 64). He was, therefore, work-

ing about seven feet above the deck. The extreme edge of the deckload was directly above an open cargo hold from which the hatches were removed by respondent himself prior to the accident (R. 47, 70). It also appeared that the hatch was not in use at the time of the accident, that is, that no cargo was being unloaded from there (R. 70, 73).

There was, therefore, evidence from which the jury could have found that an open hatch was an ordinary incident of the respondent's employment (R. 70, 73, 74). There is law, however, which would compel them to so find had they been properly instructed.

In *Smith* v. *United States,* 18 F. (2d) 110, the third officer of the steamer Douchet fell through the No. 2 hatch in the tween deck. In holding that he could not recover against the shipowner, the court said:

> "Open hatchways on a vessel which is loading or discharging are a necessity much of the time and no one realizes, or should realize more than the members of the crew that it is a danger which must exist and one of the risks incidental to the work in which they are engaged and which each of them must himself avoid."

An instruction on this issue was tendered by the petitioner (Instruction No. XIX, R. 98), was refused by the court and no equivalent was given. The refusal of this instruction or its equivalent and the one to the effect that the maintenance of an open hatch during loading or discharging is not negligence, denied to petitioner substantial rights given by the Jones Act.

Sixth Specification of Error.

Refusal to Instruct upon the Legal Effect of Assumption of the Risk and that if Proven to the Satisfaction of the Jury This Defense is a Complete Bar to the Action.

Such an instruction was tendered (Instruction No. II, R. 94). It was refused and no equivalent was given.

This instruction correctly states the law because assumption of risk, as distinguished from contributory negligence, is a complete defense.

Skolar v. *Lehigh Valley R. R. Co.*, 60 F. (2d) 893,

a case involving injuries to a seaman, in which the court said:

> "The Supreme Court has held that Congress, by eliminating the defense of assumption of the risk in the cases indicated, quite plainly intended that in all other cases such assumption should have its former effect as a complete bar to the action."
>
> *Southern Ry. Co.* v. *Hermans*, 44 F. (2d) 366.

When the courts themselves go to such length to distinguish between assumption of the risk and contributory negligence, it would seem that the distinction should be made clear to the jury. It is reversible error to confuse the two defenses in an instruction, (*Pryor* v. *Williams*, 254 U. S. 43, 65 L. Ed. 120), and this confusion may easily and almost certainly must arise when the distinction is left to the unguided action of the jury. As we have seen, the Supreme Court of California was itself confused in the very opinion rendered in this case (R. 104, 105). The courts regard the distinction between assumption of risk and contributory negligence as vital.

> "When each alike constituted a complete defense, the distinction was largely academic and it was natural

that the terms should be used with some confusion; but now that statutes have made differences in the defensive value of the two things, the distinction has become vital and has been the subject of much judicial inquiry.''

McMyler Mfg. Co. v. *Mehnke,* 209 Fed. 5.

The Jones Act incorporates the Federal Employers' Liability Act by reference and that act treats the defense of contributory negligence and assumption of the risk in two different and separate sections, (*45 U. S. C. A. Secs. 53, 54*).

There can be no doubt that the refusal to instruct the jury upon the legal effect of assumption of the risk denied to the petitioner a very substantial right under the Jones Act.

The Georgine, (*McGinn* v. *North Coast Stevedoring Co.*), 149 Wash. 1, 270 Pac. 113, 1929 A. M. C. 488.

We have thus far covered six of the Specifications of Error, all dealing with various phases of assumption of the risk. While it has not been said in the discussion of each particular specification that there was evidence tending to show that respondent knew and appreciated the dangers of various risks involved, the fact that he did is clearly substantiated by the record. He knew the hold was open and had been since the vessel left San Francisco, because not only had he participated in removal of the hatches but he could see it below him from his position on the edge of the deckload directly above it. As an experienced seaman, specially skilled in the lumber trade and the loading and discharging of cargoes of lumber for a period of eight years, he knew there were pick-up hooks aboard the vessel and he knew the dangers of walking upon the extreme edge of a deckload directly above an open hold below him. Hence, viewed from any angle, the defense of assumption of the risk was amply substantiated by the evidence.

It must undoubtedly occur to the court to wonder why the issue was not raised long before instructions were requested. As a matter of fact it was. Motions for non-suit, directed verdict and judgment notwithstanding the verdict were all made and denied and the only reason that this fact does not appear in the record is that the questions involved are sufficiently raised by the instructions requested and refused, and to print the preliminary efforts to raise the question of assumption of the risk would have been a violation of the court's desire for brevity and conciseness.

Seventh Specification of Error.

Maintenance of Open Cargo Hold During Loading and Discharging is not Negligence.

Quite apart from any question of assumption of the risk, an open hatchway on a ship while in port is not evidence of neglect on the part of the shipowner, but on the contrary, the shipowner has a right to allow the hatchways of his ship to remain uncovered and unprotected except by the usual coamings.

Dwyer v. *National S. S. Co.*, 4 Fed. 439;
The Gladiolus, 21 Fed. 417;
The Kongosan Maru, 282 Fed. 666;
Long v. *Silver Line*, 48 F. (2d) 15.

Respondent in the courts below relied upon the fact that the hold of the "Fort Bragg" was not actually in use at the time he fell, but the same rule applies whether this is so or not.

Campbell v. *Trinidad Shipping & Trading Co.*, 165 Fed. 270;
Horne v. *George H. Hammond Co.*, 71 Fed. 314.

An instruction on this issue was tendered by petitioner (Instruction No. VI, R. 95), refused and no equivalent was given.

Eighth and Ninth Specifications of Error.

Instructions Given and Refused Concerning the Open Hold in Relation to Safety of Place of Work and Proximate Cause.

Under this grouping of specifications of error, it is convenient to consider the combined effect of Respondent's Instruction No. III (R. 89), Respondent's Instruction No. IX (R. 90), given by the court, Instruction No. XV-a (R. 91), given by the court of its own motion, and Petitioner's Instruction No. II (R. 91), as amended and given by the court. The effect of these four instructions was three-fold. In the first place it permitted the jury to take into consideration the open hold as an element of negligence whereas it is not negligence as a matter of law to have the holds open when vessels are loading and discharging. In the second place, these instructions allowed the jury to find that the open hold constituted the negligence which proximately caused the respondent's injuries. And lastly, the instructions completely withdrew from the jury all question of assumption of the risk because the jury was commanded to consider the ordinary and obvious hazard of an open hold as an element of negligence.

Plaintiff's Instruction No. III given by the court (R. 89), charged negligence in three respects: First, negligent loading of the cargo; second, negligent securing of the cargo; third, negligence in leaving the hold open while the deckload was being unloaded. The instruction then concluded with the following language:

> "In other words, plaintiff alleges that the defendant negligently failed to furnish plaintiff with a reasonably safe place to work.
>
> "If you find that defendant did not provide plaintiff with a reasonably safe place to work, then defendant

was guilty of negligence and plaintiff can recover judgment against defendant, providing you find also that said negligence was the proximate cause of plaintiff's injuries."

This instruction quite plainly told the jury by the use of the phrase "in other words," that in determining whether the plaintiff's place of work was reasonably safe they were to consider the fact that no blocking had been placed around the lumber and the fact that the hatch was open. It is an outstanding example of a "roving commission." The court thereafter instructed the jury that:

> "The lumber on the deck next to an open hold, • • • constituted the place furnished by the defendant employer for the prosecution of further work" (Plaintiff's Instruction No. IX, R. 90).

and that:

> "If you find that such place of work as here described was not reasonably safe, you are instructed that it was negligence on the part of the defendant to furnish such a place of work" (Plaintiff's Instruction No. IX, R. 90).

Here again the jury were told to consider the open hold and to decide whether that fact rendered the plaintiff's place of work unsafe. This was error enough, but the court then instructed the jury that they must consider, in addition to the fact that the hold was open, everything else presented by the evidence.

At a previous stage of the case much had been made of the absence of a safety line but it developed from respondent's own witness, Paul, that a safety line was used only at night when no discharging was going on and for the purpose of preventing people from falling into the hold from the deckload, but that it was utterly impractical to have this

safety line in position when cargo was being unloaded. This was one of the elements of "the whole situation as presented by the evidence at the time of the accident", which the jury was told by the court's own instruction that it "must consider." This amazing instruction is as follows:

> "The law says the defendant must furnish a reasonably safe place for a seaman to work, meaning a reasonably safe place to work under all the circumstances of the business.
>
> "In order to determine whether defendant provided plaintiff with a reasonably safe place to work you must consider not one condition alone at the time and place, but the whole situation as presented by the evidence at the time of the accident."
>
> (Instruction No. XV-a, R. 91)

To instruct a jury that they may consider facts such as the existence of an open hold during loading and discharging, which are neither negligence nor the proximate cause is evil enough, but to instruct them that they must do so is to allow a verdict for plaintiff merely because the situation looks dangerous. A jury could hardly do anything else but return a verdict for the plaintiff under such instructions as these and they amounted in effect to a direction of a verdict for the respondent.

The principal issue in this case upon the question of negligence is whether the lumber on which respondent was standing at the time of his fall was hand stowed, as petitioner's witness, Kruse, said it was (R. 87-88), or landed in slingloads as it came from the dock, as respondent claimed. This was an issue which the petitioner was entitled to have presented to the jury and the court's instruction on the issue of safe place to work clearly deprived petitioner of that right so far as it was of any value in avoiding liability. Even if the petitioner succeeded in proving, by the prepon-

derance of the evidence, that the lumber respondent was standing on at the time he fell was hand stowed lumber, the jury, under the foregoing instructions, might return a verdict for the plaintiff nevertheless. The instructions were literally broadsides from which the respondent intended there should be no escape and the trial court made doubly sure that there should be no escape by refusing to instruct the jury that the open hold was not the proximate cause of respondent's injuries.

Petitioner proposed the following instruction, which the court refused:

> "There can be but one proximate cause of an injury and you are instructed that under the circumstances of this case the fact that the hatches were off at the time the plaintiff fell, cannot be and is not the proximate cause of the plaintiff's injuries" (Instruction No. XIV, R. 97).

The open hold was the dramatic element of this case and its presence was constantly brought to the attention of the jury. It was only by requesting instructions on the issue of what caused the plaintiff to fall, and by asking the court to eliminate the matter of the open hold, that petitioner could cure the error in respondent's instructions that the jury could consider the open hold, an element that was present in each of respondent's instructions concerning the issue of a safe place to work.

Petitioner's Instruction No. II (R. 91), was a further attempt to eliminate the issue of the open hold but as amended by the court and given, this instruction was deprived of any value it might have had.

It is too clear for argument that the open hold did not cause the respondent to fall. Had it been closed he would, under the evidence in this case, have fallen just the same.

The fact that the hold was open merely increased the length of his fall.

It was not negligence to leave the hold open during the loading and discharging of cargo as has already been abundantly established. In *Campbell* v. *Trinidad Shipping & Trading Co.* 165 Fed. 270, the libelant was a member of the crew. The hatch had been left open during the day for purposes connected with the cargo of the vessel. The accident happened in the evening about seven o'clock while the hatch covers were not in position. The court said:

> "It is evident that he (libelant) would not have been injured if the hatch covers had been in place, but no negligence or failure of due care toward the crew can be presumed from that fact."

Under the settled principles of federal law, in an action under the Employers' Liability Act, or what is the same thing, under the Jones Act, negligence cannot be presumed and it must have proximately caused the injuries.

Northwestern Pacific R. R. Co. v. *Bobo,* 290 U. S. 499, 78 L. Ed. 462;

Atchison, Topeka & Santa Fe Ry. Co. v. *Saxon,* 284 U. S. 458, 76 L. Ed. 397.

In this case, under the instructions discussed in this heading, negligence was presumed from a non-negligent act, i.e. leaving the hold open, and the jury was in effect peremptorily instructed to consider this non-negligent act not only as an act of negligence but also as the proximate cause of the respondent's injuries.

Furthermore, inasmuch as the court refused to instruct on assumption of the risk in any form whatsoever, the effect of the said instructions was to withdraw that issue from the jury entirely.

That this was a denial of substantial rights given to petitioner by the Jones Act is too apparent for further discussion.

Conclusion.

Respondent has in the courts below strenuously urged that the verdict of the jury precludes any further consideration of assumption of the risk or proximate cause. The theory is that the jury's verdict establishes negligence in failing to provide a safe place to work. This being so, respondent then argues that no workman on land or sea ever assumes the risk of his employer's negligence. This argument borders on nonsense. The trouble and the reason why we are seeking certiorari is much more deepseated and antedates the rendition of the verdict. Had the petitioner's undoubted rights under the Jones Act been carefully preserved by the court in instructing the jury, the verdict might well have been different. In fact, the Supreme Court of California said that instructions such as were asked would have been tantamount to a directed verdict (R. 105).

The California Supreme Court apparently sought to justify its decision by a glaring misstatement of the record. It said:

> "There was undisputed evidence * * * that a portion of the landed lumber toppled with the plaintiff, causing him to fall into the hold" (R. 104).

This was specifically called to the attention of the court in the petition for rehearing. While it was undisputed that the slingload which respondent and Paul were trying to get out of the ship was landed lumber, the most hotly disputed point in the case was whether respondent was standing on a landed slingload or on hand stowed lumber at the time he fell. His whole theory of negligence was built upon the ground that it was bad practice to use landed slingloads as they came from the dock rather than hand piled lumber,

which latter method he said was good stowage (R. 24). His contention was that because the lumber he was standing on was a landed load and not hand piled, is the very reason why it was not secure and the only reason why it toppled with him (Opening Statement, R. 13). Kruse's testimony on this issue is clear and unmistakable. While describing where respondent was standing at the time he fell, this witness said:

> "His feet was on the edge of the stowed lumber what was underneath the load what was hanging in the pick-up sling" (R. 88).

Assumption of the risk of ordinary and obvious hazards is not a popular defense in California. It has in large measure been abolished by statute. The Supreme Court of California has in this case abolished it by judicial fiat in all future cases brought under the Jones Act in this state.

As was said by Mr. Justice McReynolds in *Atchison, Topeka & Santa Fe. Ry. Co.* v. *Saxon,* 284 U. S. 458, 76 L. Ed. 397, particularly at p. 398:

> "This court has been obliged to grant certiorari many times to protect interstate carriers against unwarranted judgments and enforce obedience of the liability act as here interpreted."

The force of these remarks is not diminished by fact that the instant case arises under the Jones Act.

It is, therefore, respectfully submitted that the Writ should issue in accordance with the prayer of the petition.

Respectfully submitted,

HAROLD M. SAWYER,
Attorney for Petitioner.

APPENDIX.

Judicial Code, Section 237, as amended (R. S. Secs. 690, 709; Mar. 3, 1911, c. 231, Secs. 236, 237, 36 Stat. 1156; Dec. 23, 1914, c. 2, 38 Stat. 790; Sept. 6, 1916, c. 448, Sec. 2, 39 Stat. 726; Feb. 17, 1922, c. 54, 42 Stat. 366; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 937).

Appellate jurisdiction of decrees of State courts; certiorari.

(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ.

(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained

as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

(c) If a writ of error be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by a petition for certiorari, this alone shall not be a ground for dismissal; but the papers whereon the writ of error was allowed shall be regarded and acted on as a petition for certiorari and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the writ of error was allowed: *Provided,* That where in such a case there appears to be no reasonable ground for granting a petition for certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs, as provided in section 878 of this title.

Federal Employers' Liability Act (Apr. 22, 1908, c. 149, 35 Stat. 65).

SEC. 1. *Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence.*

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or

death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

SEC. 2. *Carriers in Territories or other possessions of United States.*

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

SEC. 3. *Contributory negligence; diminution of damages.*

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

SEC. 4. *Assumption of risks of employment.*

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

SEC. 5. *Contract, rule, regulation, or device exempting from liability; set-off.*

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

SEC. 6. *Actions, limitations; concurrent jurisdiction of courts; removal of case in State court.*

No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

SEC. 7. *Who included in term "common carrier."*

The term "common carrier" as used in this chapter shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

SEC. 8. *Duty or liability of common carriers and rights of employees under other Acts not impaired.*

Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

SEC. 9. *Survival of right of action of person injured.*

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury. (Apr. 5, 1910, c. 143, Sec. 2, 36 Stat. 291.)

The Jones Act (Mar. 4, 1915, c. 153, Sec. 20; 38 Stat. 1185; June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007).

Recovery for injury to or death of seaman.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 676.

GEORGE S. BEADLE, *Petitioner,*

vs.

ALFRED SPENCER.

Affidavit of One of Petitioner's Attorneys in Answer to "Affidavit of Attorney for Plaintiff Regarding Defendants's Failure to Object to Omission of Certain Instructions".

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Webster Street, being first duly sworn, deposes and says:

That he was one of petitioner's attorneys throughout the entire litigation in the California courts wherein respondent was plaintiff and petitioner was defendant, and in active charge thereof; that he prepared all of the briefs filed on behalf of petitioner in the District Court of Appeal of the State of California, First Appellate District, Division One, and in the Supreme Court of the State of California; that he has read and is familiar with the contents of an affidavit made by A. Don Duncan on the 19th day of December, 1935, which is incorporated in the additional record designated by respondent for use in the above-entitled cause; that he has read and is familiar with petitioner's brief to be filed in support of petitioner's application for a writ of certiorari in the above-entitled cause, and that in said brief no reliance whatever is placed upon Instruction No. V (R. 95); Instruction No. IX (R. 96), and Instruction No. XVI (R. 98);

That Instruction No. VII (R. 95), was set out in full

at page 70 of petitioner's opening brief, who was therein designated as appellant, in the District Court of Appeal of the State of California, First Appellate District, cause numbered 1 Civil No. 9190, and in the following four and a half pages of that brief, and ending on page 75 thereof, error was predicated upon the refusal to give such instruction;

That Instruction No. V (R. 95), was set out in full at page 108 of the said brief and in the following page and a half of said brief and ending on page 110 thereof, error was predicated upon the refusal to give such instruction;

Affiant has also read the statement entitled "Statement by counsel of defendant and appellant in appellant's opening brief, page 106," and particularly the underlined portion thereof to the effect that "the plaintiff would perhaps be entitled to have the case sent to the jury upon the issue of safe place to work." That said statement is found at page 106 of the brief hereinabove referred to in Section IV thereof, commencing at page 85 thereof, which section is headed as follows: "The Court erred to the prejudice of the appellant by specifically instructing the jury to consider matters which did not constitute negligence and were not the proximate causes and by refusing to give appellant's instructions limiting the issue of negligence and proximate cause." That in this section of the brief, as clearly appears from an examination thereof, affiant was dealing solely with the issue of negligence and proximate cause and not at all with the issue of assumption of the risk of ordinary and obvious hazards, which latter subject was discussed in detail from pages 19 to 47 and pages 49 to 85 of said brief; that immediately following this lengthy discussion of the defense of assumption of the risk of ordinary and obvious hazards, and at the

conclusion thereof, said Section IV of said brief, dealing solely with negligence and proximate cause, commences at page 85 thereof.

Further affiant saith not.

WEBSTER STREET.

Subscribed and sworn to before me this 20th day of December, 1935.

[SEAL]

LULU P. LOVELAND,
Notary Public in and for the City and County of San Francisco, State of California.

Admission of Service.

Receipt of a copy of the within Petition and Brief is hereby admitted at San Francisco, California, this 23rd day of December, 1935.

A. DON DUNCAN,
Attorney for Respondent.

FILE COPY

Supreme Court
FEB 6- 1936

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1935

No. 676

GEORGE S. BEADLE,

Petitioner,

vs.

ALFRED SPENCER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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SUPREME COURT

OF THE

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OCTOBER TERM, 1935

No. 676

GEORGE S. BEADLE,

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vs.

ALFRED SPENCER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

To the Honorable Charles Evans Hughes, Chief Justice, and to the Associate Justices, of the Supreme Court of the United States:

Alfred Spencer, respondent herein, files this brief in opposition to the Petition for Writ of Certiorari to the Su-

preme Court of the State of California to review a certain judgment of said court in favor of respondent rendered on September 3, 1935, reported in 90 *Cal. Dec.* 227, 48 *Pac.* 2*d*, 678, (R. 102), but not yet reported in the permanent bound volumes of reports edited by the official reporter.

The judgment of the Supreme Court affirms a judgment of the Superior Court of the State of California in and for the City and County of San Francisco in an action, under the Jones Act, for damages for personal injuries sustained by respondent while a seaman in the employ of petitioner.

The petitioner appealed to the District Court of Appeal of the State of California, First Appellate District, from the adverse judgment and the District Court of Appeal on December 28, 1934, reversed the judgment of the said Superior Court, but the plaintiff and respondent filed a petition for transfer of said cause to the Supreme Court of the State of California, for hearing and determination, and said petition was granted and the said appeal matter transferred to said Supreme Court, and that court rendered its opinion and judgment on September 3, 1935, affirming the judgment of said Superior Court. Counsel for petitioner states that this last named judgment, now in effect, "reverses a judgment of the District Court of Appeal", (Pet. 1) and incorporates a copy of the opinion of the District Court of Appeal in the record here (R. 99), and bases argument thereon, (Br. 25) and uses its language verbatim in commenting on the facts in several instances. (Pet. 5; Br. 17.) Respondent points out, that the use of that opinion by petitioner is based on an erroneous intimation that it still has some force and effect, whereas it has none. as a precedent or otherwise.

In *Estate of Stierlen*, 199 Cal. 140, 144, the Court said:

> "The petition of appellant was granted and this court made an order transferring said cause to this court for hearing. This was done under the authority of section 4 of article VI of the constitution, which provides as follows: 'The Supreme Court shall have power * * * to order any cause pending before the District Court of Appeal to be heard and determined by the Supreme Court.' 'When such an order is made within the time prescribed in the Constitution the decision of the district court of appeal is vacated and the matter is transferred to this court for a determination of all the material questions involved therein, to the same extent as if originally instituted in this court.' (*Rockridge Place Co.* v. *City Council*, 178 Cal. 58, 60 (172 Pac. 1110).)"

NATURE OF CASE

An exception must be made to petitioner's flat statement under this heading that "The fourth section of the Federal Employers' Liability Act * * * preserves to the employer the defense of assumption of risk". The last mentioned Act, (Sec. 4) (App. to Pet. 46) (Act of April 22, 1908, Chap. 149, 35 Stat. 65, 54 U. S. C. A. 45) does not by its terms preserve to such employer the defense of assumption of risk, but only provides that "such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee". While admittedly the defense of assumption of risk is available in action under the Federal Employers' Liability Act, and under the Jones Act, generally speaking, and has never been denied in this case, it is well

settled that the defense of assumption of risk in actions by a seaman under the Jones Act, is not applicable under the same definitions or to the same extent as in actions under the Federal Employers Liability Act.

QUESTIONS INVOLVED

FIRST QUESTION: Respondent submits that the first question, as petitioner states it, (Pet. 2) is not involved, for the primary reason that petitioner bases it on purported facts, in several instances which do not exist in the case, and in other instances, on purported facts which appear in the record to be contrary to counsel's statement, to-wit: (1) It does not appear at all that the respondent was not under articles. (2) It nowhere appears in the record that he could quit his employment without penalty or forfeiture. (3) The petitioner did not support the plea of assumption of risk by any evidence that the risks of the employment by reason of which respondent was injured were *ordinary* hazards of the employment but on the contrary only by evidence that they existed for the very first time, (R. 134) and contrary to the usual custom, (R. 132) as far as the placing of the lumber was concerned, and as far as the open hold was concerned, only by evidence that it was not "practical" to close it as it might be needed (R. 71), but that they had no intentions of using it that day (R. 74); the respondent's witnesses testifying that it was customary to close it under the circumstances existing, (Spencer, R. 117; Paul, R. 128; Thorne, R. 143) and petitioner's witness, the captain, admitting this (R. 131).

It appears after studying petitioner's brief that there are only *three* instructions which he presents which mention the defense of assumption of risk. These are II (R.

94), III (R. 94), and XIX (R. 98). No. XIX relates only to the open hold. In it petitioner asked the court to instruct the jury that if respondent helped remove the hatches and knew they were off, that the respondent assumed the risk of any injury from the open hold. It asked the jury to find that the respondent assumed the risk of falling into the open hold, because even if under the orders of the mate he assisted in taking off the hatches, and even if the open hold was not an ordinary hazard of employment under the circumstances, and even if the hold was left open contrary to the usual custom, and even if it was negligent to leave it open under the circumstances and even if the respondent was ordered by petitioner or his mate to work next to and high above said hold, under protest, and when it could have been conveniently and speedily closed. Surely there is no question but what this instruction was properly refused.

The jury by its verdict found against the facts which were the premise of the second, No. III (R. 94) and a mere reading of it shows that it was otherwise improper. This leaves only the first one mentioned, remaining on the defense, but it was not only inapplicable under the facts of this case, and the law applying, but is so broad and general, that it is stated as a mere conclusion, and could give the jury no adequate understanding of the defense.

But in view of the judgment of the Supreme Court of the State of California, and the verdict of the jury resolving all disputed questions in favor of respondent, and with reference to petitioner's subject matter, respondent submits such question might be stated as follows:

Whether in an action under the Jones Act by a seaman who has signed up as a member of the crew for a certain

voyage from San Francisco to Columbia River Ports, some in the State of Washington, and intermediate ports, and return to San Francisco (R. 113), for damages for personal injuries sustained by the toppling of an insecure and high tier of landed slingloads, on which plaintiff had been ordered by the mate, to work, under protest, next to an open hold, the hold not being used, whereby plaintiff was precipitated about 18 feet to the bottom of the hold, in which action the operator of the vessel, his employer, pleads the defense of assumption of the ordinary risks and hazards incidental to the employment, but supports the defense only by evidence that the mate had never before ordered slingloads of lumber put in any such place aboard the vessel, and where it was admitted by petitioner's witnesses and his counsel that lumber in slingloads landed thus, would be more apt to topple than when piled in the customary manner, piece by piece by hand all over the deck, with lath binders between, and where it was not customary in any event to put lumber in any such place as petitioner did, as there should have been a space between the lumber and the hatch coaming, to allow seamen to walk around same on the deck, and where the hold was left open while said plaintiff was ordered to work getting out said slingloads, right next to and high above said open hold and the hold was not used the entire morning of the injury, and where there were no orders given to the officers of the vessel to use the hold for any purpose and where the hatch covers could have been put on and the hold covered in five to ten minutes, and where it was customary to close the hold; and where the case went to the jury on the broad general issue of whether or not defendant had furnished plaintiff with a reasonably safe place to work, under all the circumstances of the business; and where the jury brought in a verdict for the

respondent, was it prejudicial and reversible error for the trial court to refuse to give the specific instructions proposed by the petitioner alleged to be applicable to the defense of assumption of risk, and where the Supreme Court of the State of California bases its judgment of affirmance upon the determination of the question of "whether under the facts, this defense (Assumption of Risk) was available to the defendant and the failure to instruct the jury thereon constituted prejudicial error", (R. 103) and where the said Supreme Court bases its judgment *upon the assumption* that the plaintiff "assumed the risks ordinarily incident to the employment" (R. 104) but holds that "the facts do not present such a case as, without question, entitled the defendant to the instructions on the question of assumption of risk, and the withholding of the instruction on that question, if error, was not prejudicial to him" (R. 105), is the petitioner entitled to a Writ of Certiorari from this court to the Supreme Court of the State of California and a re-examination of the facts by this court to determine whether the facts of this particular case justified the trial court in sending the case to the jury upon the issue of safe place to work, without giving the jury any specific instruction on assumption of risk which petitioner proposed, and from said judgment of the Supreme Court of the State of California, does it appear that the petitioner was denied a right, privilege, or immunity claimed by him under a statute of the United States by failure to give any specific instruction which he proposed, and if so, is such question a federal question, and is it of such gravity and general importance as to justify this United States Supreme Court in redetermining the cause?

SECOND QUESTION: The second alleged question involved, as stated by petitioner (Pet. 3), is practically

the same as the first question. It would be restated by respondent as follows: In such an action and under such circumstances may the court instruct the jury upon the issue of whether or not the defendant has furnished plaintiff with a reasonably safe place to work under all the circumstances of the business, without giving the specific instructions allegedly bearing upon the defense of assumption of the risk of ordinary and usual hazards, which the defendant in this particular case proposed?

THIRD QUESTION: (Pet. 3) This question set forth by petitioner, it is contended, is not involved in this proceeding for Writ of Certiorari at all. It merely relates to a defense of what constituted the "place to work"; is unimportant and could not go to the extent of depriving petitioner of any right, privilege, or immunity under a statute of the United States. It has no bearing on the failure to give petitioner's instructions allegedly bearing on the defense of assumption of risk.

FOURTH QUESTION: (Pet. 4.) It is contended that the fourth question as stated by petitioner, is not involved in this proceeding. In fact respondent concedes that it may be answered in the affirmative. It is merely a question as to whether in any negligence case, there must be a casual connection between the negligence and the injury.

STATEMENT OF CASE

Counsel for petitioner states that respondent had not signed articles (Br. 26). Under the Act of June 19th, 1886, Chap. 421, Sec. 2, as amended, April 11, 1904 (46 U. S. C. A. 563) vessels in the coastwise trade may require seamen to sign articles before a shipping commis-

sioner and whether or not Spencer did so does not appear. As to counsel's statement that Spencer could have quit his job at any time he liked without penalty or forfeiture; (Pet. Br. 26), the record references given merely establish that if Spencer quit voluntarily, they could hold up his wages for three days, and that he did not have any money to get back to San Francisco, the home port, where he lived, (R. 120) and that if the mate discharged him for disobeying orders he had to pay him right away.

There was no evidence as to penalties or forfeitures generally that the respondent seaman may or may not have suffered if he had quit the vessel voluntarily at Vallejo before she finished her voyage at San Francisco. He was not paid just like a land employee, and did not sign an ordinary payroll as petitioner states, but signed the usual seamen's payroll, which was also in the form of a release, and reflected characteristically, the strictly maritime nature of plaintiff's employment, the following being quoted from it:

"Payroll, Voyage No. 59. We, the undersigned, late mariners on board the S. S. Fort Bragg of San Francisco, on her late voyage to Columbia River and return, now performed to this place of payment * * * acknowledged * * * the sum set opposite our names, it being in full amount of our wages for services, and of all demands for assault and battery, or imprisonment of whatever name and nature, against said ——, her owners or officers * * *." (R. 113.)

We note that in his statement of the case, counsel for petitioner follows verbatim the statement of the District Court of Appeal, made in its superseded opinion (Pet. 5,

l. 5, R. 100, Fol. 149) in stating that "the ship's hold was open, which fact was admittedly known to respondent" and add "who made no protest concerning this condition (R. 30, 32) in fact, he assisted in removing the hatch covers at San Francisco before the ship sailed for Vallejo" (R. 47). Here counsel omits important testimony which throws an entirely different light upon the foregoing statements. While it is true that the respondent made no protest concerning the open hold, the testimony is that Paul, Spencer's working partner, did protest to the mate about the hold being left open, in Spencer's hearing and presence. That the mate refused to put the hatches on although it would only have taken 5 or 10 minutes to do so, and they were not using the hold at all, and that the mate told them to go ahead and do their work. This was testified to by both Spencer and Paul (R. 32, 113, 125). Obviously it would have been futile for the respondent seaman to repeat the same protest. In fact, in view of the mate's order to go ahead and do their work, it would have been insubordination. While it is true that plaintiff assisted in removing the hatch covers at San Francisco, it is a matter of which this court will take judicial knowledge, and in fact there is undisputed testimony to that effect; that seamen do nothing except under the orders of the mate or captain (R. 25, 30).

But these are all questions of fact detail, with which it is believed this court is not concerned. The case went to the jury on the broad general issue of whether or not defendant had furnished plaintiff with a reasonably safe place to work, and all of these detailed contentions as to the facts were presumably settled by the jury's verdict in favor of plaintiff and respondent.

In petitioner's statement of facts, he, in several instances. states as proven facts, merely the testimony of his own witnesses which respondent's witnesses disputed, and which conflict must be presumed to have been resolved in favor of respondent. For instance, counsel's statement that when discharging it is not practical to keep the hatches closed, because lumber in the hold may be wanted (Pet. 5, Pet. Br. 18). While it is true that Vartnaw, the first mate testified for petitioner that it was not "practical" to put the hatches on because they might want some of the lumber from the hold (R. 71), the same witness testified that he didn't know when it was going to be taken out (R. 70), and that they were not unloading anything from the hatch or hold that morning (R. 74), (the accident happened at about 9 o'clock A. M.) and that they had no orders to unload anything from the hold the morning of the accident (R. 73, 74), and that he had no knowledge that they even intended to unload in the afternoon from the hold (R. 74), and the captain testified for the petitioner that it was a general rule of safety on all vessels that whenever operations through the hatch were suspended, that the hatch covers should be put on (R. 131). The respondent and two of his witnesses testified that it was the custom when working a deck load of lumber, even when properly hand piled all over the deck, as usual, and the hatch was not being used, to put the hatch covers on and close the hold. (Spencer R. 117, Paul R. 128, Thorne R. 143.)

Counsel refers to the evidence given on behalf of petitioner that respondent was standing at the time he fell on hand stowed lumber of the dimension of 1" by 12" and refers to the testimony of petitioner's witness Kruse, the second mate (R. 87). But Kruse testified on cross-exam-

ination that some 1" by 12" 's were stowed and some were landed, (R. 135) and that he didn't know how many landed slingloads were on top of the hand-piled 1" by 12" 's, but that the slingload Spencer and his partner were taking out when he saw them was the one right up level with the timbers (about 14 feet above the deck) (R. 139). But since the undisputed evidence was that at the time the slingload of lumber or a part thereof toppled with Spencer that he was at least 6 feet below the top of the heavy timbers, (R. 122) (R. 40), having taken out the two top slingloads designated as slingloads numbers 2 and 3 (R. 35) on the diagram in evidence (R. 145) and also slingload number 6 (R. 123, 37) and that Spencer was standing down on top of slingload number 9 (R. 40, 41) putting a sling under slingload number 5 (R. 40) to take it out, and since petitioner's own witness, Vartnaw, admitted that the slingloads landed in the narrow space without being hand piled, were two or three slingloads high (R. 68), then taking Kruse's own testimony that Spencer and Paul when he saw Spencer fall were taking out a slingload even with the top of the timber 14 feet above the deck, this would necessarily be the top tier and Spencer would be standing on the second tier and according to Vartnaw's own testimony, there were *two or three* tiers or layers of landed loads, and hence Spencer could not possibly have been standing on hand-piled lumber. Kruse's testimony that he was, was entirely contrary to the testimony of petitioner's other witness Vartnaw, who loaded the vessel. Hence Kruse's testimony was not believeable. Kruse in any event was merely passing from on end of the ship to the other when he claims he looked at Spencer and Paul (R. 77). His testimony did not even raise a real conflict. The jury did not believe it. The Supreme Court of California says:

> "There was undisputed evidence that the lumber, at least from a distance of about four feet from the deck, had been 'landed' rather than stowed,— * * *, and that a portion of the landed lumber toppled with the plaintiff causing him to fall into the hold." (R. 104).

Petitioner's counsel says this is a glaring misstatement of the record (Br. 42). He is referring to the aforesaid testimony of Kruse, as being a dispute, but from the foregoing it appears that the criticism is not justified. Furthermore it is immaterial for if there was any substantial evidence to support the implied finding of the jury to the same effect, it is sufficient. And such evidence was ample. (R. 40, 43, 44, 46, 141, 144.)

Counsel for petitioner states as a proven fact that plaintiff was at the time of his injury pursuing a method of work in disobedience of specific orders and instructions (Pet. 5, Pet. Br.18), but in support of such statement refers merely to the testimony of petitioner's own witness, the captain, that a few minutes after 8 o'clock he picked out Spencer, an experienced seaman, from a group of eight seamen working around the hold and told him not to go "inside of the load" when he was putting the sling on. But the respondent, expressly denied that the captain gave him any such instructions or that he had any conversation at all with the captain that morning, and that the captain didn't come and tell him what to do and that if he didn't know his work they would fire him (R. 121) and that he didn't even see the captain that morning and that the captain was on the dock (R. 122). Thus, the captain's testimony at the most, merely raised a conflict in the evidence which must be presumed to have been resolved by the jury in favor of the respondent.

Counsel states, as an established fact that there were other and safe ways of performing the operation in which respondent was engaged at the time he fell, stating that there were appliances called pick-up hooks which could have been used and were available aboard the vessel and which respondent did not use. But here again counsel is merely stating the testimony of his own witness, the captain, on this fact detail. While the captain testified for the petitioner that the seamen working on the sling-load could tell the winch driver to move the load away from the timbers so "that the men can step right inside" (R. 58), he had theretofore testified that he had instructed Spencer "Not to go inside of the load when he was putting the sling on" (R. 53). The respondent and Paul testified flatly that they were doing the work in the only way that it was possible to do it under the particular circumstances which confronted them in taking out this particular slingload. (Spencer's, R. 48; Paul's, R. 127). Spencer further testified that in this particular case, number 5 slingload, which they were taking out, overlapped number 9 slingload, upon which Spencer was standing, and that it wasn't clear under the forward end of number 5 slingload (R. 47), and that he had to push the sling through and see if it was clear (R. 48). Paul also testified that the slingload had not come quite clear of the other lumber so Spencer had to stick one end of the pick-up sling underneath (R. 126), and that the way Spencer put the sling under the slingload was the customary and proper way for any seaman to put a sling under a slingload under the circumstances existing with regard to this particular situation (R. 126, 127). But these methods of work in any event would have no bearing on the defense of assumption of risk, and petitioner proposed no instruction informing the jury that it did. If Spencer was neg-

ligent in choosing an unsafe method of work, when a safe method was surely and plainly available, this would be contributory negligence only, which would not be a bar to recovery in an action under the Jones Act, but would only go in mitigation damages.

Plaintiff's Exhibit Number 9, the drawings made by the respondent seaman on the blackboard and referred to all through the trial, which diagrams were finally admitted in evidence at the suggestion of counsel for the petitioner, although purportedly over his protest (R. 145), and a photograph of which was made by counsel for defendant and included in Appellant's Brief in the trial court, gives quite a graphic picture of the situation as presented; showing top, side, and end views of the landed slingloads in their relation to the heavy timbers and the open hold, and it seems a photostat thereof could well have been included in petitioner's brief, here.

It appears clearly from these drawings that respondent was working in an enclosed "box", the port and starboard sides being the heavy timbers towering about ten feet high, above the single ledge of slingloads which were being unloaded inside and the aft and forward ends being the octagonal steel tanks set on the deck, reaching about 14 feet above the deck (R. 19, 20). After Spencer and his partner had taken out the three slingloads numbered 2, 3, and 6 on the diagram, Spencer was working on this ledge formed by this slingload between the heavy timbers and the hatch coaming about 5½ or 6 feet above the hatch coaming (R. 40), and the hold being open, he was on a ledge inside of a sort of "pit", it being about 6 feet to the top of the timbers (R. 122) and about 18 feet from where Spencer was standing to the bottom of the hold, which is the distance he fell (R. 103).

It thus appears from the record that all of the foregoing evidence which petitioner says was in support of the defense of assumption of risk was all disputed by respondent's witnesses and also not in fact supported by petitioner's witnesses Vartnaw, or Capt. Samuelson or Kruse. All this evidence referred to by petitioner bore in the last analysis upon the question of whether or not the defendant had furnished the plaintiff with a reasonably safe place to work under all the circumstances of the business. Thus the determination of the question as to whether defendant had furnished plaintiff with a reasonably safe place to work involved the determination of the question by the jury as to whether or not the footing furnished plaintiff to do his work was as reasonably safe as the circumstances of the business would permit. The element of the open hold involved the determination of the question as to whether or not it was negligence on the part of the defendant to leave the hold open under the circumstances of this particular case, and whether or not leaving it open, together with other circumstances surrounding plaintiff's place of work, made plaintiff's place of work unreasonably unsafe. Since the jury found by its general verdict that the defendant failed to furnish plaintiff with a reasonably safe place to work and that such negligence proximately contributed to his injuries, they in legal effect, by the same implied finding, found against what petitioner contends was his evidence on assumption of risk.

The general verdict imported findings in favor of the respondent upon all material issues, and resolved all conflicts in testimony in his favor.

Petersen v. *Klitgaard*, 212 Cal. 516;
Gjurich v. *Fieg*, 164 Cal. 429;

Dreyer v. *Cole*, 210 Cal. 339;
4 C. J. 772.

We quote from the statement of facts of this case as stated by the Supreme Court of the State of California in its opinion and judgment (R. 102).

> "On the particular voyage in question timbers 52 feet long were piled lengthwise of the deck, on the port and starboard sides, to a height of about ten feet above the deck. Between this lumber and the hatch coamings there was a space about forty inches wide, and about forty-five feet in length, the forty-five feet being the distance between two large tanks fore and aft of the hatch. At Coos Bay a quantity of 1 x 12's and 2 x 3's was loaded into the spaces so left on the port and starboard sides of the hatch and between the two tanks, up to the top of the long timbers. No space was left between the load and the hatch coamings.
>
> When the ship docked at Vallejo to take off cargo the plaintiff was ordered to assist in unloading the lumber piled between the large timbers and tanks and the hatch coamings. While this lumber was being unloaded the hatch covers were off. The plaintiff and another were preparing a load of lumber to be swung ashore, about six or eight feet above the hatch coamings. While the plaintiff was attempting to place a cargo sling around a sling load of lumber, he fell into the hold, a distance of about eighteen feet, and was seriously injured.
>
> (R. 104) The accident occured at nine o'clock on the morning of May 4, 1931. The hatch covers had been taken off the night before. There was undisputed evidence that the lumber, at least from a distance of about four feet from the deck, had been 'landed' rather than stowed, that is, placed in sling

loads just as it came from the dock, rather than hand piled piece by piece with laths at stated distances to make a solid packing, and that a portion of the landed lumber toppled with the plaintiff causing him to fall into the hold. It further appeared that a request had been made to replace the hatch covers, but that the plaintiff was ordered to work with the hatch uncovered. It was undisputed that there was no necessity for the hatch to be open, as no unloading from the hold was being done that morning. There was also evidence that it was unusual to load the deck so close to the hatch."

It is believed that under the rule of this court, where the two courts of the State of California, the trial court by the implied finding of the jury based on their general verdict, and the supervision of the judge thereof on Motion for New Trial, and then the Supreme Court of the State of California, as above, have found the facts, as stated by the Supreme Court that this court will probably accept those as facts.

Luckenbach v. *McCahan Sugar Co.*, 248 U. S. 139, 145;
The Iroquois, 194 U. S. 240.

This court has frequently stated that it will not consider questions of fact on certiorari.

Houston Oil Co. of Texas v. *Goodrich*, 245 U. S. 440.

JURISDICTION

The jurisdiction of this court to consider this matter is admitted, in so far as statutory authority is concerned, but respondent submits that the proceeding does not in fact present a federal question.

SUMMARY OF ARGUMENT

The only questions which petitioner seeks to have this court adjudicate relate to 12 instructions given and refused by the trial judge. The Supreme Court of the State of California considered all of these specifications and found nothing in the ruling of the trial court which would justify a reversal of the judgment based on the verdict of the jury. (R. 106.) The fifth and seventh specifications of error and the eighth and ninth specifications of error are all based upon the instructions of the court relating to the petitioner's duty to furnish the respondent with a reasonably safe place to work under all the circumstances of the business, and the court's instruction that they must consider not one element alone of the place of work, but must consider the whole situation at the time of the accident; which instructions petitioner contends permitted the jury to find that leaving the hold open was negligence; and that the court erred in refusing to give his proposed instructions to the effect that it was not negligence for the petitioner to leave the hold open. But the court did not instruct the jury as petitioner contends, to consider the open hold as negligence nor even to consider it as a part of respondent's place to work, but left it to the jury to determine what constituted the place to work. All of the specifications regarding the failure to instruct the jury that leaving the hold open was not negligence may be disposed of by the statement that the requested instructions were not proper statements of the law and were not consistent with the facts of the case, and by the admission that generally speaking, under ordinary circumstances, when a vessel is in port and is actually loading or discharging cargo from the hold, that leaving the hold open is not necessarily negligence. But it is not solely a question of law, and

the rule is that whether or not it is negligence, depends upon the particular circumstances existing in a particular case. It appears very clearly in the instant case that leaving the hold open when it was not being used for loading or discharging cargo at all, and when the evidence was that it was customary to close the hold under the particular circumstances existing here and respondent was ordered to work above it under protest, and it could have been closed in ten minutes and the respondent by reason of its being open fell into the hold an additional distance of about twelve feet over the distance he would otherwise have fallen, it was clearly negligence. The specified instructions do not present to this court a question of law, but purely a question of fact.

As to the third specification of error; this relates to the refusal of two instructions concerning an alleged choice of methods of work. Counsel does not attempt to justify them in their form as presented. Both instructions conclude that if the jury should find against respondent under those instructions that respondent could not recover. But it is established that if there was sufficient evidence that the respondent was performing the detail of the work in an unsafe way when there was a safe way readily and plainly available, that this would at the most be contributory negligence and not assumption of risk, which would not bar respondent from a recovery. Furthermore, neither instruction was a correct statement of the law in other respects. Both instructions were attempted to be based upon certain detailed facts relating to the work, and they invaded the province of the jury and were argumentative. They do not mention the defense of assumption of risk.

As to the fourth specification of error; the refusal to give a certain instruction concerning alleged disobedience

of instructions given for respondent's safety, this instruction was also based on details of work. It concluded, that if the jury should find in favor of petitioner thereon that respondent could not recover at all. But such disobedience, if any, would be contributory negligence and not assumption of risk. It was unquestionably based on certain testimony given by the captain that he picked out the respondent, a seaman of eight years' experience on steam lumber schooners from among the other seven seamen working around the hold, to give him certain specific instructions as to how to put a sling around a slingload; saying that the reason he gave the instructions was that he was afraid that respondent would "fall in the hold". But the testimony, including that of the captain himself was to the effect that the first mate was in charge of unloading operations; that at the time the captain allegedly spoke to the respondent that the men were not even getting out the slingloads next to the open hold but were working up on top of the heavy timbers, a place of safety, although the captain testified that they were working on the slingloads. Considering other facts brought out, the testimony of the captain on this phase was entirely discredited. The respondent expressly denied that any such conversation took place, and testified that the captain was not even on deck at the time that he fell. In view of the verdict of the jury it must be deemed that they resolved the conflict, if there could be any real conflict, in favor of the respondent, and hence in any event the petitioner could not have been injured by the refusal to give any such instruction, if otherwise legally proper.

As to the first and second specifications of error which petitioner's counsel states present the "vital issue in this case", they are based entirely on the court's refusal to

give one very general instruction on assumption of risk and another instruction based upon some attempted distinction between a seaman attached to a coastwise vessel, as was respondent; and another seaman. Furthermore, the second instruction was based upon a fact which the jury by its general verdict found against the respondent, to-wit, that in order to find in favor of petitioner under said instruction, the jury would have had to find that the injuries respondent received were caused by a danger which was "ordinarily incident to the business of carrying deck loads of lumber on ships when that business is being conducted in a manner as prudent and careful as such a business can be carried on under all the circumstances". Whereas, the undisputed testimony was that the danger was not ordinarily incident to the business of carrying deckloads but occurred for the first time, and that the business was not being conducted in a manner as prudent and careful as the business could be carried on, for the undisputed evidence was that it was being carried on in a most unusual manner, landing slingloads in a high pile right next to the hatch coaming and leaving the hatch coaming open, when it was customary to pile the lumber piece by piece over the entire deck with lath binders between every twelve inches of cut lumber and every three or four feet apart, and that it was not customary to put such slingloads in the narrow place at all, and that it was customary to leave a space so seamen could walk around the hatch coaming on the deck, and that it was customary to close the hold under the circumstances. The jury specifically found by its general verdict that the petitioner negligently failed to furnish the respondent with a reasonably safe place to work. Hence the jury found against petitioner on the second in-

struction, and petitioner could not well have been injured by the refusal of the trial court to give it.

As to the first instruction it was entirely too general, and even if the defense of assumption of risk had been available, which it was not under the circumstances of the case, the proposed instruction would not have given the jury an adequate understanding of the defense.

Hence it is contended that the refusal of the trial court to give any of the specific instructions which petitioner proposed, did not deprive the petitioner of a right, privilege or immunity under a statute of the United States, to which he was entitled. Petitioner does not set forth in the record the entire charge of the trial court, as we understand should be done to have errors in instructions considered.

The case went to the jury on the ultimate question as to whether or not the petitioner had negligently failed to furnish the respondent with a reasonably safe place to work under all the circumstances of the business. Unquestionably the jury was properly and fairly instructed on this issue, and as said by the Supreme Court of California in its judgment in this case, "The submission of the case to the jury on the issue considered by it, was as favorable as the defendant could expect under the authorities cited herein". (R. 106.) It is not a novel procedure to send a seamen's case to the jury on the ultimate issue of safe place to work. It is as fair to the ship operator as it is to the seaman.

Petitioner's counsel in his brief finds no fault with a single authority cited by the Supreme Court of the State of California in support of its decision. Petitioner's main contention seems to be that he is entitled to have this

court determine the case anew for failure to give his instructions on assumption of risk. Only three of the instructions, those two mentioned in the first specification and the one relating to the assumption of risk of the open hold, XIX (R. 98) make any mention of the doctrine of assumption of risk. The third could not be given as the question of negligence in leaving a hold open depends entirely on the circumstances of the case. It was otherwise objectionable. The second instruction, it has been noticed was certainly not proper to be given, leaving as the only possibility the first instruction on assumption of risk, which was entirely too general to inform the jury regarding the defense.

The opinion of the Supreme Court of the State of California does not deny that the defense of assumption of risk is available in actions under the Jones Act, but is based upon the assumption that it is, generally speaking, an available defense. But obviously it is not always a defense, and there are several exceptive circumstances under which it is not available at all as against a seaman suing under the Jones Act, and several of these exceptions are admittedly present in this case. It seems to be settled that a seaman does not assume the risk of his employer's negligence in failing to provide him with a reasonably safe place to work. Practically the same rule obtained under the old rules of master and servant under the common law. Since the case went to the jury upon fair instructions on the issue of safe place to work and the jury found against petitioner on this issue, he could not have been damaged by the refusal to give any instruction on assumption of risk, as it was not applicable. Petitioner's counsel admitted in their opening brief before the state appellate court that if the trial court had

properly instructed the jury on negligence that the respondent would probably be entitled to have the case sent to the jury on the issue of safe place to work. The Supreme Court of California bases its decision principally upon authorities of the federal courts holding as above and petitioner does not contend that those authorities do not so hold.

A seaman does not assume the risk when he is injured while performing duties under orders. It was an undisputed fact in this case that respondent's working partner protested in respondent's presence and hearing against the hold being left open, when they were ordered by the mate to unload the slingloads of cut lumber next to and high above the open hold, but that the mate ordered them to proceed with the work stating that they could get the lumber out without closing the hold. The Supreme Court of California adverts to the fact that the respondent was ordered to work with the hatch uncovered. Petitioner's counsel expressly admits this principle in his own proposed instruction to the jury number I (R. 92), the refusal to give which however, petitioner has now abandoned as a specification of error upon which he relies. But in that instruction petitioner asked the court to instruct the jury that the plaintiff was a seaman and that it was the general rule that seamen do not assume the risks of their employment when they are acting in obedience to orders; the only qualification sought to be put upon that admitted rule being a request to the court to instruct the jury that respondent might have been excepted from that rule in case they should find that he did not have the status of a "seaman". In petitioner's brief, his counsel attempts to make a vital distinction between a seaman generally speaking and a seaman such as was the

respondent. There is no such distinction, and could not well be. Counsel cites two cases involving; one, an "extra" fireman employed on different tugs, and the other a deck-hand on a tug, which employees were not attached even to any certain tug but worked in the harbor in the day time on a tug and lived at home at night. In those two cases decided by the Circuit Court of Appeals of the Second Circuit the court held that on account of the nature of the plaintiffs' employment that the analogy of land workers was more persuasive and permitted the application of the defense of assumption of risk against the employee, with its full rigor. But as to seamen as such, the court re-iterates the principle referred to above. The Supreme Court of the State of California considers those two cases and decides, it is contended, quite properly, that those cases could not apply to the respondent, as he was attached to this particular vessel and had signed up for a certain voyage out on the ocean, and lived upon the vessel and had the status of a seaman and was entitled to the same construction of the Jones Act as the general class of seamen. In view of petitioner's own admission that the defense of assumption of risk is not available where the seaman is working under orders, he waived any injury, if such there was, by the court's refusal to give his general instruction, or any instruction on assumption of risk. It has been held in several cases to be reversible error to give any instructions on assumption of risk under similar circumstances.

Petitioner only contends that he was injured by the refusal to give his instructions on assumption of risk as to ordinary and obvious hazards. But as noted the undisputed evidence was that the hazards encountered by respondent whereby he was injured were not ordinary haz-

ards of the employment. The jury found that it was not a reasonably safe place to work, and its general verdict implied a finding that the unloading operations were being carried on in a negligent manner. An employee does not assume the risks of dangers of his employment which are unusual and with which he is confronted for the first time. He does not assume the risk of his employment arising from the unusual and negligent manner in which the work is being carried on. The risk arose from the negligence of the first mate in landing the lumber in such a place without hand-stowing and compelling the seamen to work thereon without closing the hold and hence the negligence was that of a fellow servant. A seaman under the Jones Act does not assume the risk of his employment caused by the negligence of a fellow servant. Counsel in stating the facts, in several instances states as proven facts, the testimony only of his own witness, which was discredited, and was disputed by respondent's witnesses and which conflict must be deemed to have been resolved in favor of the respondent. These questions of fact are not properly presented to this court, as this court is only concerned with questions of law. The propriety of giving the proposed instructions depends essentially upon an appreciation of the evidence. The trial court, who had all the facts before it, concluded that the proposed instructions were not proper under the evidence. The Supreme Court of the State of California has also concluded that they were not proper under the evidence. This court has heretofore held that under such circumstances they would not review the judgment.

The ruling of the trial court refusing the instructions and the judgment of the Supreme Court concluding that there was no error in refusing or giving instructions,

could be based squarely upon the principles and rulings of the common law. And where this is the case it is believed that this court will not review the judgment.

The proceeding does not present a novel question or one that has not heretofore been ruled upon by this court. Almost precisely the same questions were presented to this court in *Panama Ry. Co.* v. *Johnson*, 264 U. S. 375, 393, and in that case this court concluded that considering the state of the evidence, the proposed instructions on assumption of risk would not have conveyed a right understanding of the subject and might well have proved misleading, and held that their refusal was not error.

There is only t[illegible] one general instruction which petitioner specifies, which could possibly be given on assumption of risk if the defense had been available and that is too general to give any adequate understanding of the subject. The petitioner cannot show reversible error unless he can point to specific instructions which were framed properly to be given the jury and which were applicable under the facts, and which were legally correct. The Supreme Court of California has decided the case in accord with applicable decisions of this court and not contrary thereto. The case in reality involves very ordinary principles of the law of negligence as presented in an ordinary case in personal injury actions. The question as to whether the specific instructions should have been given in this case, it is believed, is not such a matter of gravity and general importance as to require this court to review the judgment of the Supreme Court of the State of California.

In the event that this court should grant a Petition for Writ of Certiorari and review the judgment of the Su-

preme Court of the State of California and compel this seaman to go back to the trial court and re-litigate his cause of action for damages for personal injuries with the consequent additional heavy expense and great delay, there would remain in any event only one general instruction on assumption of risk which could be given the jury at all upon that subject, and which would not enlighten them. Furthermore under the facts of this particular case, even if such an instruction were given, it is apparent that it would not be likely to cause a verdict for the petitioner.

ARGUMENT

Reply to Petitioner's First and Second Specifications of Error

"The refusal to Give any Instruction at All Upon Assumption of the Risk."

The real question is not whether the trial court refused to give any instruction at all upon assumption of risk, but whether the petitioner was denied a material, right, privilege, or immunity under a statute of the United States to his prejudice, by the refusal of the trial court under the circumstances of this particular case, to give any specific instruction allegedly bearing on the defense of assumption of risk, which the petitioner proposed, and which he can justify as being a correct statement of the law, and which would probably cause a verdict for defendant, if the judgment should now be reversed and the cause sent back to be tried anew, and that specific instruction given.

It is submitted that counsel for petitioner does not correctly paraphrase the holding of the Supreme Court of the State of California. (There is no *holding* of the District Court of Appeal.) Counsel says that the opinion of the Supreme Court of California "holds squarely and without supporting authority that when the issue of negligence in actions under the Jones Act is presented to the jury the trial court may, notwithstanding the evidence upon the question, withdraw the issue of assumption of ordinary risks of the employment from the jury's consideration". The opinion speaks for itself. In the first place the opinion of the Supreme Court is based directly on the hypothesis that the respondent here did assume the risks ordinarily incident to his employment (R. 104, Fol. 154). As far as its criticized holding is concerned, it seems that it should be stated in the language of the Supreme Court, which is as follows:

> (R. 104.) "The important issue was whether the plaintiff was furnished a reasonably safe place to work and whether there was evidence that the defendant was negligent in failing to provide such a reasonably safe place. The question was submitted to the jury on that basis, and we see no prejudicial error in the refusal of the court specifically to instruct the jury as to whether the plaintiff had assumed the risk. The effect of the instructions as given was to place liability on the defendant only if a reasonably safe place was not provided, and there was negligence in failing to make such provision.
>
> It has become well recognized, both before and since the incorporation into the Jones Act of the Federal Employers' Liability Act, that the entire doctrine of assumption of risk is not applicable to seamen. The reasons underlying this policy are

stated in the cases recognizing the exception. (Lafourche Packet Co. vs. Henderson, 94 Fed. 871; The Colusa, 248 Fed, 21; Cricket S. S. Co. vs. Parry, 263 Fed. 523; Ziegler v. Alaska Portland Packers, Assn., 296 Pac. 38; LeJeune v. General Pet. Corp., 128 Cal. App. 404; 56 Corp. Jur. 1198, et seq., McGeorge v. Charles Nelson Co., 107 Cal. App. 148.) It is also well settled that under the federal statutes an employee does not assume the risk of the defendant's negligent failure to provide a safe place to work. (Seaboard Air Line v. Horton, supra; States S. S. Co. v. Berglann, supra; Ziegler v. Alaska Portland Packers Assn., supra; The Kongosan Maru, 282 Fed. 666; Engfors v. Nelson S. S. Co., supra.) The rule of assumption of risk presupposes that the employer has performed the duty of caution, care and vigilance which the law casts upon him. (Cincinnati, M. O. & T. P. Ry. Co. v. Hall, 243 Fed. 76, 81.)" (R. 105.)

* * * * * *

(R. 105.) "The record supplies sufficient evidence to go to the jury on that issue and to support its implied finding thereon. Upon the record presented the submission to the jury of the instructions requested would be the practical equivalent of directing a verdict for the defendant. The facts do not present such a case as, without question, entitled the defendant to the instructions on the question of assumption of risk, and the withholding of instruction on that question, if error, was not prejudicial to him.

There was no failure to instruct the jury on the defendant's theory of the case. The submission of the case to the jury on the issue considered by it, was as favorable as the defendant could expect under the authorities herein cited.

We have examined the other specifications of error with reference to the refusal to give certain requested

> instructions and to the admission and exclusion of certain evidence, and find nothing in the rulings of the trial court which would justify a reversal."

It is submitted that this actual holding of the Supreme Court does not furnish sufficient premise as a basis for counsel's further argument.

Respondent submits that it is quite noteworthy that petitioner's counsel does not criticize a single case cited by the Supreme Court in support of its opinion, but states that its holding is "*without* supporting authority", and, in support of his argument in his First and Second Specifications of Error, he cites cases in the main, arising, under the Federal Employers' Liability Act; railroad cases involving land workers, and *does not cite a single case involving a "seaman" under the Jones Act.*

Cases Under the Federal Employer's Liability Act or Land Cases Involving the Old Rules of Master and Servant Do Not Furnish a Rule of Decision on the Defense of Assumption of Risk when the Defense Is Sought to Be Set Up Against a Seaman Suing Under the Jones Act.

This court, in *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, 375, settles this distinction beyond all question, when this court says therein:

> "This court has held that the act is to be liberally construed in aid of its beneficent purpose to give protection to the seaman and to those dependent on his earnings. *Jamison* v. *Encarnacion,* 281 U. S. 635. * * *
>
> Approaching the decision of this case in a like spirit of liberality, we put aside many of the refine-

ments of construction that a different spirit might approve. * * *

We are warned, however, that in giving this content to the statute we are omitting to give heed to its reference to the act regulating the remedies of railroad employees, and are ignoring the standards of duty thus carried over and adopted. The Employers' Liability Act for the protection of the employees of common carriers by railroad gives a remedy to such employees "for injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier," or by reason of any negligent defect in its roadbed or equipment. 35 Stat. 65, Sec. 1; 45 U. S. Code, Sec. 51. True indeed it is that a common carrier by land is not subject to a duty, except in special circumstances, to give maintenance or cure to sick or disabled employees. * * * We do not read the act for the relief of seamen as expressing the will of Congress that only the same defaults imposing liability upon carriers by rail shall impose liability upon carriers by water. The conditions at sea differ widely from those on land, and the diversity of conditions breeds diversity of duties. This court has said that "the ancient characterization of seamen as 'wards of admiralty' is even more accurate now than it was formerly." *Robertson* v. *Baldwin*, 165 U. S. 275, 287. Another court has said: "The master's authority is quite despotic and sometimes roughly exercised, and the conveniences of a ship out upon the ocean are necessarily narrow and limited." *Scarff* v. *Metcalf*, 107 N. Y. 211, 215; 13 N. E. 796. * * *

The act for the protection of railroad employees does not define negligence. It leaves that definition to be filled in by the general rules of law applicable to the conditions in which a casualty occurs. Cf. *Murray* v. *Chicago & N. W. Ry. Co.*

62 Fed. 24, 31; *Ward* v. *Erie R. Co.*, 230, 234; 129 N. E. 886, *Michigan* v. *Michigan Trust Co.*, 286 U. S. 334, 343. Congress did not mean that the standards of legal duty must be the same by land and sea. Congress meant no more than this, that the duty must be legal, i. e., imposed by law; that it shall have been imposed for the benefit of the seaman, and for the promotion of his health or safety; and that the negligent omission to fulfill it shall have resulted in damage to his person. When this concurrence of duty, of negligence and of personal injury is made out, the seaman's remedy is to be the same as if a like duty had been imposed by law upon carriers by rail."

And in *Bainbridge* v. *Merchants & Miners Co.*, 287 U. S. 278, 281, this court says:

"A more serious question is whether suits under the Jones Act may be regarded as suits by seamen "for wages or salvage" or "to enforce laws made for their health and safety". Such a suit is not for wages or salvage. Is it to enforce a law made for the health or safety of seamen? In the *Bennington* (D. C.) 10 F. (2d) 799, the question was answered in the negative. In *Grant* v. *United States Shipping Bd. Emergency Fleet Corp.* (C. C. A. 2d) 24 F. (2d) 812, it was answered in the affirmative. The court in the latter case rejected the construction put upon the provision by the decision in The Bennington as too narrow and not in accord with the liberality Congress intended toward seamen, holding that the Jones Act, being an addition to the Seaman's Act, was intended to be consistent with the spirit of that Legislation, which was directed to promote the welfare of American seamen. We agree with that view. The Jones Act is an amendment to Section 20 of the Seamen's Act. The Jones Act has the effect of bringing into the maritime law, for the benefit of

seamen, all appropriate statutes relating to employers' liability for the personal injury or death of railway employees. Both acts are to be treated as part of the maritime law. *Panama R. Co.* v. *Johnson,* 264 *U. S.* 375, 389, 68 *L. Ed.* 748, 753, 44 *S. Ct.* 391. Seamen have always been regarded as wards of the admiralty and their rights, wrongs, and injuries a special subject of the admiralty jurisdiction. *Benedict, Admiralty 4th ed., Sections* 182, 603. The policy of Congress, as evidenced by its legislation, has been to deal with them as a favored class. *Robertson* v. *Baldwin,* 165 *U. S.* 275, 287, 41 L. Ed. 715, 719, 17 *S. Ct.* 326. In the light of and to effectuate that policy, statutes enacted for their benefit should be liberally construed. The Seamen's Act, which includes the Jones Act by amendment, is entitled in part "An act to promote the welfare of American seamen * * * and to promote safety at sea." (March 4, 1915) *Chap.* 153, 38 *Stat. at L.* 1164, *U. S. C. title* 46, *Sec.* 569. It requires little if any aid from the doctrine of liberal construction to enable us to say that the present suit is one to enforce a law made for the safety of seamen. Petitioner will not be required to prepay or make deposit to secure fees or costs, and the Clerk will be directed to refund the deposit already made."

In *Grimberg* v. *Admiral Oriental S. S. Line,* 300 Fed. 619 (D. C. W. D. Wash.), plaintiff, a watchman, member of a crew of a vessel, sued for damages for injuries sustained by him on the vessel operated by defendant, which injuries were caused by plaintiff tripping and falling over an iron bar holding down a tarpaulin upon a hatch cover which bar was, negligently, not fastened in place and that the deck was insufficiently lighted. The court says:

"It therefore follows that an injured seaman must

be held to have assumed the risk of injury from any and all those dangers ordinarily and naturally incident to the service in which he engages; but it cannot be that Congress intended to make applicable to seamen the entire doctrine of assumption of risk, as the same has been developed under the law of railway carriage."

* * * * * *

(4) The seaman does not assume the risk of injury resulting from the unseaworthiness of the vessel, defective appliances, or a place to work not made reasonably safe, although with knowledge of the danger he continues in the employment. *Cricket S. S. Co.* v. *Parry* (*C. C. A.*) 263 *Fed.* 523, *at* 525 *and* 526, certiorari denied *Cricket Steamship Co.* v. *Parry*, 252 *U. S.* 580, 40 *Sup. Ct.* 345, 64 *L. Ed.* 726. The danger of injury because of negligence, if any, in failing to provide means to fasten the iron bar in place, the plaintiff would not assume. *Cricket S. S. Co.* v. *Parry* (*C. C. A.*) 263 *Fed.* 523, *supra*. If there was no negligence in the foregoing respect, and the iron bar was either negligently placed in the position described, or negligently permitted to get and remain in such position, which negligence was that of an officer of the ship or member of the crew other than plaintiff, the plaintiff would not, without more, assume the risk of injury arising from such negligence; for the Employers' Liability Act and the La Follette Act both abolish the defense of a fellow servant's negligence."

And in *Cricket S. S. Co.* v. *Parry* (C. C. A. 2nd), 263 Fed. 523, 525, a leading case, the court says:

"(3) The defendant contends that the plaintiff cannot recover because he shipped with knowledge of the condition complained of,—two decisions of this Court are cited. We do not think them applicable because the plaintiffs were shore servants, in the

first, a longshoreman, and in the second, a railroad hand. We are considering the rights of seamen who have constituted from early times a peculiar class. The unusual protection extended to them is reflected in the familiar saying that they are the wards of the admiralty. As to the second proposition, shipowners cannot justify furnishing them with defective and dangerous appliances on the ground that they knew of it * * * This seems to us in accordance with the view that the courts have taken throughout as to the relation of master and seaman."

And in *The Colusa*, 248 Fed. 21 (C. C. A. 9th), where a seaman was injured on account of a defective turnbuckle, the court says:

"(5) It is contended that the appellee assumed the risk of the injury, but the ordinary rule which applies to the assumption of risk by a workman is not applicable to the case of a seaman on board ship. * * * If owners cannot be held as insurers of the appliances furnished to the ship for the safety of seamen, they ought at least to hold to the strictest rule of diligence and care."

In *Lafourche Packet Co.* v. *Henderson*, 94 Fed. 871 (C. C. A. 5th), after discussing some cases applying to the doctrine of assumption of risk as applied to land workers, the court says:

"Without discussing or disputing the law as declared in the authorities mentioned, we are of opinion that it is not applicable to the case in hand. There must be a different rule as to the risks assumed by seamen on board ship from the rule as to the risks assumed by servants and other employees on land."

In *McGeorge* v. *Charles Nelson Co.*, 107 Cal. App. 148,

that court quotes the above noted distinction from *Grimberg* v. *Admiral Oriental S. S. Line,* 300 Fed. 619, 621, and then adds:

> "On the subject before us it is not claimed that the statutes above mentioned repealed the rules of the maritime law. It could not reasonably be so claimed because it has been directly adjudicated that the statutes referred to had the general effect of extending the rights of seamen who might suffer injury. (*Panama R. Co.* v. *Johnson,* 264 U. S. 375.) Before the enactment of the statutes above mentioned the liability to a seaman was quite well digested in what is said in 35 Cyc., at page 1244. That liability has been broadened. (Panama R. Co. v. Johnson, 264 U. S. 375, 391.)"

In 56 *Corpus Juris* 1099, Sec. 682, that work states the distinction in the following language:

> "The fact that the Jones Act makes the Federal Employers' Liability Act applicable to seamen does not mean that the doctrine of assumption of risk shall have an identical definition under both acts.
>
> On the contrary, assumption of risk as applied to seamen under the Jones Act should be defined differently from such doctrine as applied to railroad employees under the Employers' Liability Act. (Citing *States S. S. Co.* v. *Berglann,* 41 Fed. (2nd) 456; *Grimberg* v. *Admiral Oriental S. S. Line,* 300 Fed. 619, 621; *McGeorge* v. *Charles Nelson Co.,* 107 Cal. App. 148.) And in this connection it has been pointed out that under the two acts the maritime, rather than the common, law controls with respect to assumption of risk by seamen."

Accordingly, the Supreme Court of California in its opinion, in the instant case, says: (R. 105.)

> "It has become well recognized, both before and since the incorporation into the Jones Act of the Federal Employers' Liability Act, that the entire doctrine of assumption of risk is not applicable to seamen. The reasons underlying this policy are stated in the cases recognizing the exception. (*Lafourche Packet Co. vs. Henderson*, 94 Fed. 871; *The Colusa*, 248 Fed. 21; *Cricket S. S. Co. vs. Parry*, 263 Fed. 523; *Ziegler* v. *Alaska Portland Packers' Assn.*, 296 Pac. 38; *LeJeune* v. *General Pet. Corp.*, 128 Cal. App. 404; 56 *Corp. Jur.* 1198, et seq.; *McGeorge* v. *Charles Nelson Co.*, 107 Cal. App. 148)."

Counsel for petitioner refers to *The Iroquois*, 194 U. S. 240. But that case was a libel against the ship in admiralty to recover damages for the failure of a master to provide suitable surgical treatment and care for the libelant, who had suffered injury by a fall from the main yard to the deck of the vessel. The risk referred to by this court in the quotation from the case that counsel sets forth, was not a risk of injuries from any unsafe place to work, or while working in any certain place under orders, but was a risk only of not being able to procure medical attention promptly on account of the distance of the vessel from a port where the services of a competent physician could be obtained, and the last mentioned was the only point in the case. This court affirmed the decree in favor of the seaman.

Whatever May Be the Rule Under the Federal Employers' Liability Act or Under the Old Law of Master and Servant, the Defense of Assumption of Risk Is Not Available at All Against a Seaman Suing Under the Jones Act in the Following Circumstances:

A. A seaman never assumes the risk of negligent acts of those in charge of the ship in failing to provide him with a reasonably safe place to work.

In *States Steamship* v. *Berglann* (C. C. A. 9th) 41 Fed. (2d) 456, Berglann, a seaman, brought his action under the Jones Act for personal injuries. The court says:

> "(3, 4) In performing such tasks a seaman assumes all of the ordinary risks of his employment, but, because he cannot quit the ship nor control the actions or orders of the ship's officers, he does not assume the risks of negligent acts of those in charge of the ship whereby his place of work as a seaman is made unsafe; nor does he assume the risk of failure of those in charge of the ship to take such precautions as the perils of the sea may render necessary and reasonable. *Panama R. Co.* v. *Johnson* (C. C. A.) 289 Fed. 964; *Zinnel* v. *United States Shipping Board, etc.* (C. C. A.) 10 F. (2d) 47; *The Colusa* (C. C. A.) 248 Fed. 21."

In *Grimberg* v. *Admiral Oriental S. S. Line,* 300 Fed. 619, 621 (D. C. W. D. Wash.), the court says:

> "(4) The seaman does not assume the risk of injury resulting from the unseaworthiness of the vessel, defective appliances, or a place to work not made reasonably safe, although with knowledge of the danger he continues in the employment. *Cricket S.*

S. Co. v. *Parry* (C. C. A.) 263 Fed. 523 at 525 and 526, certiorari denied *Cricket Steamship Co.* v. *Parry*, 252 U. S. 580, 40 Sup. Ct. 345, 64 L. Ed. 726."

In *Zinnell* v. *U. S. S. B. E. F. Corp.* (C. C. A. 2nd), 10 Fed. (2nd) 47, Zinnell's administrator sued under the Jones Act for damages for negligence alleged to be an unseaworthy vessel, and that the defendant did not provid the intestate with a reasonably safe place to work. The answer pleaded assumption of risk as a defense. The court said:

> "We therefore decline to engage in any discussion as to seaworthiness, beyond, indeed, observing that the term has itself the most relative meaning. (Citing ing cases.) All we need, and do, hold is that under the law of master and servant, as now in force by statute, the circumstances were such as would allow the jury to find that there was no rope, and that its absence made the intestate's place of work unsafe. * * *
>
> (6) As to the assumption of risk, on which we all agree, we need do no more than refer to our own decisions in *Cricket S. S. Co.* v. *Parry* (C. C. A.) 263 Fed. 523, and *Panama R. R. Co.* v. *Johnson*, (C. C. A.) 289 Fed. 964, and to the law in other circuits, *Lafourche Packet Co.* v. *Henderson*, 94 Fed. 871, 36 C. C. A. 519 (C. C. A. 5th), and *The Colusa*, 248 F. 21, 160 C. C. A. 161 (C. C. A. 9th)."

In *Engfors* v. *Nelson Steamship Co.* 131 Ore. 108, 115, plaintiff, a seaman, sued under the Jones Act for damages and personal injuries sustained on his vessel, a steam schooner, plying along the Pacific Coast, while it was moored to a dock at Portland, Oregon, taking on a cargo of cut lumber. He had been ordered to descend

into the hold to assist there in placing lumber as it was delivered. The court says:

> "Under the Federal Employers' Liability Act (45 USCA, secs. 51-59), when the injury is caused by the failure of the master to provide a safe place to work or safe appliances, the defense of assumption of risk cannot be made."

In *Wychgel* v. *States Steamship Company,* 135 Ore. 475, 495, the plaintiff, a seaman, sued under the Jones Act for injuries sustained by falling through a hatchway while his steamship was fastened to the dock in China. The negligence alleged was that the hatches placed over the hold had been improperly placed and were in an unsafe and dangerous position and tipped or gave way under his weight and precipitated him into the hold. The Supreme Court of Oregon considers the refusal of the trial court to give certain instructions on assumption of risk, proposed by respondent, and upholds the trial court's refusal, saying:

> "In the case of *Engfors* v. *Nelson Steamship Co.,* 131 Ore. 108 (280 P. 337), under the Federal Employers' Liability Act, Mr. Chief Justice COSHOW writing the opinion, we find:
>
> > 'Under the Federal Employers' Liability Act when the injury is caused by the failure of the master to provide a safe place to work or safe appliances, the defense of assumption of risk can not be made.' "

The defendant steamship company petitioned this court for Writ of Certiorari in this case, *States Steamship Company* v. *Wychgel,* which was denied on October 12, 1931.

In *Ziegler* v. *Alaska Portland Packers' Assn.*, 135 Ore. 359, 368, the plaintiff, a seaman, employed on a coastwise vessel as a cook was traversing a deck load of timbers constituting a part of the deck load, when he stumbled upon an upturned timber and was thrown to the floor. The court says:

> "(4) We come now to the contention that the court's instructions upon the defense of assumption of risk was erroneous.
>
> * * * * * *
>
> Since this action is founded upon a charge that the injury occurred upon the high seas due to a defectively stowed cargo, we believe that the instruction is not subject to any criticism from the defendant. *Howarth* v. *United States Shipping Board* (C. C. A.) 24 F. (2d) 374; *Zinnel* v. *United States Shipping Board* (C. C. A.) 10 F. (2d) 47, and *United States Shipping Board* v. *O'Shea*, 55 App. D. C. 300, 5 F. (2d) 123. See, also, *Engfors* v. *Nelson Steamship Co.*, 131 Ore., 108, 280 P. 337, especially the statement therein that under the Federal Employers' Act the employee never assumes a risk caused by the master's failure to provide a safe place for working."

And the rule is stated in 56 *Corpus Juris*. 1100 as follows:

> "The employer cannot escape responsibility for damage to a seaman arising from breach of his duty to furnish a seaworthy ship or safe place to work, on the plea that the seaman assumed the risk of injury arising therefrom. (Citing *Southern Ry Co.* v. *Hermans*, 44 Fed. (2nd) 366.)"

These authorities were all cited in the state courts, and consequently the Supreme Court of California in the instant case, while not basing its decision entirely on that theory, says:

> "It is also well settled that under the federal statutes an employee does not assume the risk of the defendant's negligent failure to provide a safe place to work. (*Seaboard Air Line* v. *Horton,* supra; *States S. S. Co.* v. *Berglann,* supra; *Ziegler* v. *Alaska Portland Packers' Assn.,* supra; *The Kongosan Maru,* 282 Fed. 666; *Engfors* v. *Nelson S. S. Co.,* supra.) The rule of assumption of risk presupposes that the employer has performed the duty of caution, care and vigilance which the law casts upon him. (*Cincinnati, M. O. & T. P. Ry Co.,* v. *Hall,* 243 Fed. 76, 81.)" (R. 105.)

Counsel does not attempt to controvert the force of these authorities. Since the case went to the jury on the issue of whether or not the petitioner had fulfilled his duty of furnishing to respondent a reasonably safe place to work, under all the circumstances of the business, and the jury found by its general verdict that he had not, then the petitioner could not have been injured by the refusal of the trial court to give any of his proposed instructions on assumption of risk, even if in proper form, for the foregoing reason that a seaman does not assume the risk of his employer's negligence in failing to provide a reasonably safe place to work.

It is not a novel procedure to send a seaman's case to the jury on the general issue of safe place to work.

In *The Kingsholm,* 1928 A. M. C. 204; 246 N. Y. 300, the following appears:

> "Cardozo, C. J.—The case went to the jury to see whether there had been a negligent failure by the master to make the place of work safe. * * *"

Also the recent case of *Hanson* v. *Luckenbach Steamship Co.,* 1933 A. M. C. 764 (C. C. A. 2d), was sent to

the jury on the issue as to whether or not the employer had provided his seaman with a reasonably safe place to work.

In *Cincinnati, N. O. & T. P. Ry. Co.* v. *Hall* (C. C. A. 6th) 243 Fed. 76 the court says that the questions of assumption of risk and inspection and warning only reflect "upon the broader and ultimate question immediately involved in the charge of the existence of a duty by defendant to exercise reasonable care to provide for its employees a safe place in which to work."

In fact, petitioner's counsel in his brief in the state court admitted that if the court had given proper instructions as to each act of negligence relied upon, "* * * * the plaintiff would, perhaps, be entitled to have the case sent to the jury upon the issue of safe place to work." (Affidavit of A. Don Duncan—Appendix.)

B. A seaman does not assume the risk involved in obeying orders aboard ship, even though the danger of working in the place he is ordered to work, might be obvious:

The rule is stated in 56 C. J. 1101 as follows:

> "Since a seaman is under the duty of obeying orders ordinarily he does not assume any risk involved in doing as he is ordered. (Citing *U. S. S. B. E. F. Corp* v. *O'Shea*, 5 Fed. (2nd) 123; *Becker S. S. Co.* v. *Snyder*, 31 O. App. 379; *Masjulis* v. *U. S. S. B. E. F. Corp.*, 31 Fed. (2nd) 284, 285; *Panama R. R. Co.* v. *Johnson*, 289 Fed. 964 (affirmed), 264 U. S. 375; *McGeorge* v. *Charles Nelson Co.*, 107 Cal. App. 148.)"

In *Lejeune* v. *General Petroleum Corporation of California* (*on rehearing*), 128 Cal. App. 404, 414, the plaintiff, a member of the crew of a coast-wise vessel, sued under

the Jones Act for injuries sustained by him while weighing anchor off a small port in California, when thrown by a sudden reversal of the anchor chain when ordered to work in the chain locker. The court says:

> "He is bound to obey, and there is no assumption of risk, even though the danger may have been obvious to him. *United States* v. *Boykin,* 49 Fed. (2d) 762; *Panama R. Co.* v. *Johnson,* 289 Fed. 964; *Wychgel* v. *States S. S. Co.,* (Ore.) 296 Pac. 863, 135 Ore. 475."

In *Holm* v. *Cities Service Transportation Company,* (C. C. A. 2d) 60 Fed. (2d) 721, the court says:

> "Where a seaman is injured when acting under orders, he does not assume the risk. *Panama R. R. Co.* v. *Johnson,* 1923 A. M. C. 798, 289 Fed. 964; *Masjulis* v. *Shipping Board* (C. C. A. 2d) 31 Fed. (2d) 284."

In *Lafourche Packet Co.* v. *Henderson,* 94 Fed. 871, 876, the plaintiff was a member of the crew of a steamboat running to and from New Orleans, on the lower reaches of the Mississippi. The vessel was lying moored at a plantation dock. The plaintiff who had the status of a seaman, was ordered to go into the hold to aid in storing cargo and was injured there while loading sugar barrels. The defendant claimed that he assumed the risk. The court held:

> "A seaman aboard ship is bound to perform such services as may be required of him in the line of his employment. He cannot hold back and refuse prompt obedience because he may deem the appliances faulty or unsafe. Masters of ships exercise large powers, and they may legally compel obedience to orders. (Then quoting from another case) 'It may be, as

urged so strongly by the appellant, that the libelant received these appliances and proceeded to use them without objection; but if this be so it must be be considered that on board ship a sailor is not expected to, nor is for that matter permitted, before executing an order, to question the propriety of the order or the sufficiency of the materials furnished.' ''

Also in *Masjulis* v. *U. S. S. B. Corp.* (C. C. A. 2d) 31 Fed. (2d) 284, the court gave instructions on assumption of risk similar in effect to those petitioner requested here. The plaintiff was a seaman and was injured while his vessel was at the dock. There was a verdict for defendants and plaintiff appealed, assigning as the only error, the instructions given on assumption of risk. The court says:

"Since the plaintiff was using the rope under orders, it was error to submit the question of assumption of risk to the jury. *Cricket Steamship Co.* v. *Parry* (C. C. A.) 263 F. 523; *Panama Railroad Co.* v. *Johnson* (C. C. A.) 289 F. 964.

* * * * * *

The charge given put the plaintiff where he would be at the disadvantage of having to decide between assuming the risk of injury caused by defective appliances, due to the negligence of his superiors, or of assumption of risk of disobedience to the order of his superior officer, with whatever consequences that would entail, and in either event of assuming the risk of his choice. This in effect gave to the defendants a distinct defense to the action, to which under the law they were not entitled."

And in the case of *Hanson* v. *Luckenbach S. S. Co. Inc.*, (C. C. A. 2nd) 1933 A. M. C. 764, the court says:

"Being a seaman, it is well settled that the plaintiff did not assume any risks involved in obeying or-

ders. (*Cricket S. S. Co.* v. *Parry*, 263 Fed. 523, C. C. A. 2nd; *Panama R. R. Co.* v. *Johnson*, 1923 A. M. C. 798, C. C. A. 2nd; *Zinnell* v. *U. S. S. B. E. F. Corp.*, supra; *Holm* v. *City Service Co.*, C. C. A. 2nd, 1932 A. M. C. 1188, 60 Fed. (2nd) 721.)"

In the instant case, as pointed out in the statement of facts it was undisputed that the first mate had ordered respondent and his working partner to proceed with the unloading of the landed slingloads, stating that it was not necessary to close the hold. (R. 32, 113, 125.) The Supreme Court of California mentions such testimony in its statement of the facts of this case. (R. 103.) Since, as noted, this testimony stands without any contradiction whatsoever by petitioner's witnesses, the petitioner could not have been materially injured, or denied, to his material prejudice, any right, privilege or immunity under a statute of the United States by the failure of the trial court to give any specific instruction on assumption of risk, if in proper form.

In fact in *McGeorge* v. *Charles Nelson Co.*, 107 Cal. App. 148, 150, the trial court gave several instructions on assumption of risk very similar to a portion of several of the instructions which petitioner complains were not given in the instant case, and the District Court of Appeal of California said:

"(1) Prior to the enactment of the statutes above mentioned it had become the settled law that when it was the duty of a servant to obey an order he was entitled to indemnity against the risk and this rule was especially applicable to seamen. (1 Shearman and Redfield on Negligence, secs. 207h and 211a.)

* * * * * * *

In doing what he did, as stated above, there was

some evidence that the plaintiff was acting under orders. In obeying orders he did not assume the risk of using an unfit tool. (*The Osceola*, 189 U. S. 158, 175 *Silveira* v. *Iverson*, 128 Cal. 187, 192; *U. S. Shipping Board Emergency Fleet Corp.* v. *O'Shea*, 5 Fed. (2d) 123, 125; *Masjulis* v. *U. S. Shipping Board*, 31 Fed. (2d) 284, 285; *The Richelieu*, 27 Fed. (2d) 960, 972.) (3) The trial court gave several instructions which were in violation of the rules above stated. It will do no good to set all of them forth.

* * * * * * *

Such instructions were not applicable to an action by a seaman under the facts of the instant case."

And for giving such instructions on assumption of risk, when there was some evidence that the seaman was acting under orders, the District Court of Appeal reversed the judgment. A Petition for Transfer to the Supreme Court of California for hearing and determination was denied September 4, 1930.

In petitioner's proposed instruction No. I which he has included in the record here, (R. 92) but which he does not refer to now in his brief as being erroneously refused, he asked the court to instruct the jury:

" * * * * *

The plaintiff in this case is a seaman, and it is the general rule that seamen do not assume the risks of their employment when they are acting in obedience to orders.

* * * * * *

(R. 93, Fol. 138.) The defendants in this case have interposed the defense that the plaintiff was injured by a risk which he assumed, and whether this defense is available to them or not depends upon your finding of what the status of the plaintiff was when

the command to unload was given."

It is submitted that this proposed instruction, while not otherwise proper to be given the jury, contains a sufficient admission obviating the giving of any instructions on assumption of risk in this case, and constituting a waiver of petitioner's insistence in this court that this court should reverse the judgment of the Supreme Court of California for failure of the trial court to give his proposed instructions on assumption of risk.

C. Petitioner negligently failed to furnish a reasonably safe place to work as the jury found. The immediate negligence was that of the first mate, a fellow-servant of respondent, and under the Jones Act a seaman does not assume the risk of the negligence of a fellow-servant.

The first mate was in charge of loading the vessel, (R. 62) and he was in charge of the unloading and ordered the seamen to proceed to unload the slingloads piled between the heavy timbers and the hatch coaming (R. 114, 125), and he was also the fellow-servant who refused to order the hold closed.

In *Lejeune* v. *Gen. Petroleum Corp.*, 128 Cal. App. 404, the District Court of Appeal of California, says:

> "A seaman in the performance of tasks connected with his employment does not assume the risk of negligent acts of those in charge of his ship or their failure to take reasonable precautions. (*States S. S. Co.* v. *Berglann*, 41 Fed. (2d) 456.)"

In 56 *Corpus Juris*. 100 the rule is stated to be:

> "The doctrine of assumption of risk is inapplicable where the damage was proximately caused by the

> negligence of a fellow servant (Citing *Newport News Shipbuilding Co.* v. *Watson,* 19 Fed. (2d) 832) * * *. The seaman does not assume the risk of injury from the negligence of an officer (citing *Grimberg* v. *Admiral Oriental S. S. Line,* 300 Fed. 619.) or from another member of the crew. (citing *Grimberg* case.)"

To the same effect is *Reed* v. *Gen. Director of Railroads,* 258 U. S. 92 and *Harvey* v. *Texas & Pacific R. Co.,* 166 Fed. 385, 392.

In *C. & O. Ry. Co.* v. *Proffit,* 241 U. S. 462, 468, this court in an action under the Federal Employers' Liability Act, says:

> "And as has been laid down in repeated decisions of this Court, while an employee assumes the risks and dangers ordinarily incident to the employment in which he voluntarily engages so far as these are not attributable to the negligence of the employer or of those for whose conduct the employer is responsible."—etc.

D. According to petitioner's witness this was the first time this particular hazard was ever created so far as landing the slingloads in the narrow space was concerned, and it is the general rule that an employee does not assume the risk of dangers of his employment which are unusual and with which he is confronted for the first time.

Vartnaw, the first mate, testified for the petitioner that this was the first time that he had ever landed slingloads in any such space or in fact the first time that he had failed to pile the lumber piece by piece over the entire deck with lath binders between every 12 inches of lumber (R. 134). Under such circumstances the employee does not assume the risk.

In *Devaney* v. *Atchison, etc., R. Co.*, 219 Cal. 487, 496, in an action under the Federal Employer's Liability Act where a brakeman was thrown off the top of a box-car by a violent stopping of the freight train, the court says:

> "But it is settled without question and as a matter of law that the employee does not assume the risk of being thrown off the top of a car by a negligent stop or an unusual stop of the violence indicated by the undisputed physical facts in the present case. (Citing cases.) * * *"

In *Anderson* v. *Monticello S. S. Co.*, (1916) 30 Cal. App. 296, 298, a sailor recovered damages for injuries sustained in attempting to catch a heavy line with a spike on the end which penetrated one of his eyes. The court held that he did not assume the risk for two reasons; first, the nature of its defect and danger of its use were not obvious; and second,

> "The plaintiff had never in fact been called upon to perform the particular duty which either required the use by himself, or exposed him to the danger incident to the use by others of this heaving line."

This case was of course not under the Jones Act.

E. The ledge of landed slingloads of lumber constituted means or appliances furnished by petitioner for the prosecution of further work. A seaman does not assume the risk of defective appliances.

To the effect that a similar footing for a workman, to-wit, a beam, constituted such means or appliances, is *Majors* v. *Connor*, 162 Cal. 131.

A seaman does not assume the risk of his employer's

failure to furnish him with safe means and appliances with which to work. *Panama Ry. Co.* v. *Johnson* (C. C. A. 2d), 289 Fed. 964; *Howarth* v. *U. S. S. B. E. F. Corp.*, 1928 A. M. C. 397; *McGeorge* v. *Charles Nelson Co.*, 107 Cal. App. 148.

In 56 *Corpus Juris*. 1100, Section 686, the rule is stated:

> "The rule of general maritime law that a seaman does not assume the risk of defective and dangerous appliances or equipment remains in full force and effect under the Jones Act. (Citing cases.)"

F. The carrying on of the unloading operations by ordering respondent to work on top of insecure landed slingloads high above an open hold was found by the jury to be unusual and negligent, that is that it was not a reasonably safe place to work. It is established that a seaman does not assume the risk arising from the unusual and negligent manner in which the work is being carried on.

In *C. & O. Ry. Co.* v. *Proffit*, 241 U. S. 462, 468, this court says:

> "To subject an employee without warning to unusual dangers not normally incident to the employment, is itself an act of negligence. * * * The request requested defendant to be acquitted if the usual method of doing the work was pursued irrespective of the question of the negligence of the yard crew in carrying it out. * * * Even if plaintiff knew and assumed the risks of an inherently dangerous method of doing the work, he did not assume the increased risk attributable not to the method but to negligence in pursuing it."

In *Hansen* v. *U. S.*, (D. C. S. D. N. Y.), 1933 A. M. C.

472, the vessel lay at a port where the seaman was injured while loading logs, the court says:

> "Mahogany logs are generally stowed one by one in level layers. * * * The stowage did not take place in accordance with such usual custom. * * * Though the libelant (plaintiff seaman) may have assumed the risk of the employment, which in this case was very great, he did not assume the risk arising from the unusual and negligent manner in which the work was being carried on."

In *Anderson* v. *Matson Navigation Co.*, 125 Cal. App. 447, a seaman was injured apparently at a dock and sued under the Jones Act. The court says:

> "In the present case, even assuming that respondent may be said to have assumed the ordinary risks attendant upon lowering heavy objects into the hold on a line, it cannot be said that he assumed the increased risks resulting from the negligence of his fellow employees in pursuing that method. * * * Under these circumstances, the doctrine of assumption of risk was not applicable. * * * "

For the above reasons, in view of the undisputed facts in this case, and the verdict of the jury, it is submitted that it would have been prejudicial and reversible error for the trial court to give any instructions on assumption of risk, (if there had been a verdict for the defendant). As the Supreme Court of the State of California says:

> "The facts do not present such a case as, without question, entitles the defendant to the instructions on the question of assumption of risk, and the withholding of instruction on that question, if error, was not prejudicial to him." (R. 105.)

Petitioner Seeks to Draw Some Distinction Between a Seaman Such as Was the Respondent, and the General Class of Seaman. There Is No Such Distinction.

Respondent admittedly had the status of a seaman and petitioner in his own instructions asked the court to instruct the jury that respondent was a seaman. (R. 92, fol. 137, R. 94, 94, 149.)

Petitioner's counsel does not point out just what bearing penalties and forfeitures have on this case. Counsel for petitioner is unable to point to any case which draws any distinction between the rights, privileges, and obligations of a coastwise seaman as distinguished from a so-called deep-sea seaman, and there is no such distinction. This court in *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367; *Bainbridge* v. *Merchants & Miners Trans. Co.,* 287 U. S. 278; and in fact every other case on the subject has considered seamen as one broad general class with certain obligations existing on the part of the master or shipowner toward the seaman, such as maintenance and cure, which are annexed by law to the relation. *Cortes* v. *Baltimore Insular Line,* supra, (p. 372). The Supreme Court of the State of California in its opinion herein considers this contention of petitioner and in reference thereto, says:

> "The appellant contends that if that defense is not available in the case of a seaman suing under the Jones Act, nevertheless the plaintiff is not a seaman but is rather in the class of longshoremen and stevedores who live on shore and are not subject to the discipline of the ship and may quit at will. This argument is predicated on the showing that the vessel was engaged only in the coastwise trade, and was

never any great distance from a port, and that the plaintiff was not under any necessity of subjecting himself to unsafe employment, but could quit at will. The cases relied upon by the defendant, however, do not indicate that the mere engagement in coastwise trade alone is sufficient to create the exception. In such cases as *Skolar* v. *Lehigh Valley R. Co.*, 60 Fed. (2d) 893, *the Scandinavia,* 156 Fed. 403 (see also *Scheffler* v. *Moran Towing & Trans. Co.*, 68 Fed. (2d) 11), the plaintiff lived on shore and otherwise was not strictly a seaman subject to orders and discipline as such. We think the rule of those cases was not intended to be extended to the case of a seaman simply because he was employed on a vessel which touched ports frequently." (R. 104.)

Counsel in his brief cites the two foregoing cases of *Skolar* v. *Lehigh Valley Ry. Co.*, 60 F. (2d) 893; and *Scheffler* v. *Moran Towing and Trans. Co.*, 1934 A. M. C. 441), (Pet. Br. 26). But it is submitted that the Supreme Court of California has properly disposed of those cases in so far as they have any bearing upon the instant case. As pointed out by the Supreme Court, in those cases the employees were only harbor workers, working on tugs, in a harbor, serving aboard only during the day and going home each night, and not members of the crew, even of any particular tug. Such material difference in the status of the plaintiffs, in those cases, was the basis of the decisions of those cases. But whether those cases were correctly decided or not, certainly they have nothing in common with the facts of the instant case where the respondent signed up on the Fort Bragg for a voyage from San Francisco to Columbia River ports and return, and at the end of the voyage was expected to sign a payroll that indicated at least, that he could have been imprisoned for disobedience of orders (R. 113) and where the respondent

lived aboard the vessel night and day (R. 50) as an A. B. Seaman (R. 16) attached to the vessel.

In other words, counsel's two cases, in fact illustrate the difference between the application of the defense of assumption of risk as applied to land workers, which plaintiffs were, practically, in the two cases cited, and its application as applied to seamen. The court in those cases recognizes the rule as above but holds the plaintiffs there should be excepted as they were not in fact. seamen.

There could not well be a distinction as to rights and obligations as between so-called coastwise seamen and deep-sea seamen, for the reason that the Act would not then have a uniform application, which it must have. *Panama Railroad Co.* v. *Johnson,* 264 U. S. 375, 387. It would permit seamen to render one sort of obedience when five miles off the coast as a coastwise seamen and another sort of obedience when five miles off the coast as a deep-sea seaman, and still another kind of obedience when the ship happened to be in port; which attempted distinctions would be subversive of that discipline imposed upon and required of seamen from early times.

The Refusal of the Trial Court to Give the Specific Instructions on Assumption of Risk Requested by Petitioner Was Not Prejudicial or Reversible Error Even If Such Instructions Could Have Been Legally Given Under the Facts, for the Reason That They Were Not Properly Framed Nor Did They Correctly State the Law.

Counsel under the first and second specification of error complains that he was deprived of a substantial right accorded to him under the Jones Act and the Federal Employer's Liability Act by the court's refusal to give two

specific instructions which he refers to as being in the record, "and generally the instructions discussed in Specifications of Error 1 to 6 inclusive" (Pet. Br. 28). As to the instructions referred to in petitioner's other specifications of error 3 to 6 inclusive, respondent will refer to them where they are mentioned in those specifications.

Although 17 proposed instructions are included in the record, under these two first particular specifications, petitioner has abandoned any objection except as to instructions number II and III (R. 94). Counsel does not attempt to justify these two specific instructions except in a general way by his previous argument, and does not print them in his argument.

The entire charge of the court is not printed, as required, 4 *C. J.* 546.

As to Instruction No. II, it is:

> "If you find as a fact that the plaintiff assumed the risk of the particular danger which caused his injuries, he cannot recover anything in this action."

For the legal reasons hereinbefore stated the instruction could not properly be given, and it was not proper to be given for the additional reason that it was entirely too general, in not defining in any way whatsoever for the jury, what facts might constitute assumption of risk.

II.

Reply to Petitioner's Third Specification of Error

"Refusal of Instructions Concerning Choice of Methods of Work"

Under this heading (Pet. Br. 28) counsel claims that the petitioner was also denied substantial rights accorded

to him by the Jones Act by the court's refusal to give his instructions numbered VII and XI, giving merely the record reference of these two instructions, without attempting to justify the specific instructions, except generally.

Neither of these instructions purport to be upon the defense of assumption of risk. They are both, as a matter of law, directed toward contributory negligence which is not a bar. Nevertheless both of the instructions conclude, that if respondent could have performed the work in a manner involving no risk of the edge of the deck load giving away or of falling into the hold that *the plaintiff could not recover in the action.* As noted in the statement of the case, both Spencer and Paul testified that the work was being done in the only way possible to do it under the circumstances. There was, in fact, no contradiction of this testimony but only suggestions generally as to how it might have been done, such testimony being given by the petitioner's witness, Captain Samuelson. The general verdict of the jury imports findings in favor of the respondent upon this issue. *Petersen* v. *Klitgaard,* 205 Cal. 516; *Dreyer* v. *Cole,* 210 Cal. 339, supra.

The Alleged Choice of a Dangerous Way, If a Safe Way Was Readily Available, Would Be Only Contributory Negligence Which Is Not a Bar to Recovery.

Counsel cites several cases under this third specification (Br. 29) claiming that they hold contrary to the last heading.

The cases do not so hold. The first case, *Hardie* v. *New York Harbor Drydock Corp.,* 9 F. (2d) 545; did not involve a seaman at all, but involved a land worker not in

the actual performance of any duties. There was no defense of assumption of risk set up but the sole question was that of contributory negligence, as appears very clearly from the decision.

In counsel's next case, *Beulah Coal Co.* v. *Verbrugh*, (C. C. A. 8th) 292 Fed. 34, 38, an action by a miner against his employer under the old law of master and servant, the court holds entirely contrary to counsel's contention as follows:

> "From this excerpt (from the testimony) it is too plain for argument that plaintiff was guilty of contributory negligence.
>
> • • • • • •
>
> "But in view of the conclusion • • • that plaintiff was upon the record guilty of the grossest *contributory negligence*, no occasion arises to pursue the subject of assumption of risk, further than the merely general observations set out above."

Counsel's next case, *Williams Cooperage Co.* v. *Headrick*, (C. C. A. 8th), 159 Fed. 680, 683, did not involve a seaman, but was brought by a mill-hand under the old law of master and servant. The only error assigned was the court's failure to grant a motion for an instructed verdict on the ground of plaintiff's *contributory negligence*. And the court says:

> "Where the evidence at the close of a trial so clearly discloses the fact that the *plaintiff was guilty of negligence* which directly contributed to his injury • • • it is the duty of the trial court to instruct the jury to return a verdict for the defendant."

Counsel's next case, *The Indrani*, (C. C. A. 4th) 101 Fed. 596, involved a stevedore in the employ of a con-

tractor engaged in loading the ship. The court points out in that case clearly that it was decided on the theory of contributory negligence and not assumption of risk.

Counsel next quotes some purported language of this court (Br. 29) in *Seaboard A. L. R. Co.* v. *Horton*, 233 U. S. 492, 503, wherein this court is supposed to have said in that case that:

> "Whenever discrimination between them becomes necessary, the use of defective ways or works with notice of the defect and appreciation of the danger is held to be assumption of the risk and not contributory negligence."

No such language appears in the opinion of this court in that case. This was pointed out to counsel in the state courts in Respondent's Reply Brief, as such purported quotation was also set forth in petitioner's brief in the District Court of Appeal.

Counsel's next case, *The Mandalay*, 42 Fed. (2d) 437 was not an action under the Jones Act, but a proceeding for limitation of liability; to determine first, the question of whether there was any liability, and then to limit same, and it was tried without a jury in admiralty. Furthermore, it does not hold as contended by counsel. The decision was not based upon a question of a method of doing work but it was based upon the ground that the seaman was unnecessarily using as a place of work a beam which was not intended as a place to work and where the seaman was not ordered to work or expected to work.

Counsel's next case of *Holm* v. *Cities Service Transp. Co.*, 60 Fed. (2d) 721, is not in point for the reason that the seaman there was not working at all but as the court holds:

> "So a seaman off duty, who has gone for a drink of water and decides to return to his room over a deck he knows is slippery * * * when he knows there is a safe, though somewhat longer way for him to return, must be held to have assumed the known and obvious risks incident to his voluntary choice."

Counsel's next case, *The Romulus,* 1926 A. M. C. 831, 833, is not on the point at all. It was not an action under the Jones Act but was a libel in admiralty for personal injuries against the vessel. It does not appear how the libelant was hurt. The facts referred to in the opinion are very meager. All the court holds is that the libelant was expected to use his experience and skill in doing the work. The trial judge resolved the conflict in favor of the shipowner. No authorities whatsoever are cited in the decision.

Counsel's next case, *Crockett* v. *Brandt,* 271 Fed. 415, has absolutely no bearing on petitioner's point. It was an action for damages for "unseaworthiness". The court states that as the accident could be attributed to the negligence of the mate the shipowner would not be liable but puts this on the ground that the shipowner was not (at the time of that accident) liable for the negligence of a fellow-servant, and holds that the accident was not due to any negligence or lack of care on the part of the owner in making the vessel seaworthy.

Counsel's next case, *West Kentucky Coal Co.* v. *Parker,* 229 Ky. 685, 17 S. W. (2d) 753, was not under the Jones Act at all, although counsel cites it under a heading, "This rule is also followed under the Jones Act." (Br. 30), but was an action under the Federal Employers' Liability Act. There the accident resulted solely from the slipping off

of a line around a timber, the line having been placed there by the orders of plaintiff as vice-principal and under his direction, and he was hit by same after he was warned to stand further away. He was not working under orders.

The leading case in California on this point is *Douglas* v. *S. P. Co.*, 151 Cal. 242, 251, where the court says:

> "When a safe way is provided by an employer and a dangerous way exists, if an employee chooses to take the dangerous way and is injured, he is guilty of contributory negligence as a matter of law. This is the rule universally recognized."

In the recent case *Devaney* v. *Atchison*, etc., R. Co., 219 Cal. 487, 496, the Supreme Court of California re-affirms the legal effect of such negligence:

> "(4) The defendant argues that there was open to the plaintiff a choice between two *methods* of doing the work and that the plaintiff chose the more hazardous. This argument is properly addressed to an issue of contributory negligence which does not appear to have been raised. Moreover, no showing was made that in the ordinary course of his duties the postion taken by the plaintiff was one which he was not entitled to choose." (Italics ours.)

To the same effect is *Payne* v. *Oakland Traction Co.*, 15 Cal App. 127, 140.

Counsel here refers to pick-up hooks again but respondent has already met the suggestion that pick-up hooks might have been used in connection with the particular work respondent was performing, when hurt.

Counsel cites *The Mexoil*, 25 Fed. (2d) 457. The correct title of this case is *June* v. *Pan American Petroleum & T. Co.* But this was not an action under the Jones Act

but was a libel by a seaman to recover damages on the ground of the alleged unseaworthiness of the vessel, consisting in the failure to fit his bunk with a side piece. But the court found that the berth was in fact equipped with the usual side boards and that the seaman would probably not have fallen out of his bunk had he not been intoxicated. Respondent submits the citation has no application.

Counsel also cites *The Mangore*, 1933 A. M. C. 229. The title of this case is *Brittingham* v. *Ore Steamship Corporation*, (C. C. A. 4th). Counsel says that this was an action in admiralty under the Jones Act. It was apparently so filed but it is difficult to perceive how it could be both, as where a seaman elects to sue under the Jones Act he sues at law. It appears from the decision that the only negligence specified was the failure of the shipowner to supply the seaman with goggles, but that even this specification was later abandoned by the libelant because of uncontradicted evidence showing that the injured man himself had charge of goggles supplied by the ship and kept them in his room. It was further shown that in that case that the approved way of doing the work was to wear goggles. So that the basis of the decision was not assumption of risk and the defense was not even mentioned in the decision as having been set up by the owners; but the basis thereof is an utter failure of proof of negligence on the part of the ship owner, as is shown by the following quoted portion of the decision: "* * * we have no authority to find against the owner of the ship in the absence of negligence on its part."

The Supreme Court of California in its decision under attack here, held on this point:

> "The question is not whether the plaintiff properly handled the slingload which he was preparing to be lifted off. That question is rather one of contributory negligence, (see *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 503; *McMyler Mfg. Co.* v. *Mehnke*, 209 F. Ed. 5; *Devaney* v. *Atchison, etc., R. Co.*, 86 Cal. Dec. 645; *Engfors* v. *Nelson S. S. Co.*, 280 Pac. 337; *Barker* v. *Kansas City, M. & O. Ry Co.*, 88 Kan. 767, 129 Pac. 1151), and is not otherwise involved in a consideration of the matter before us."

Counsel does not critize the cases cited in support of this holding. The authorities cited by the Supreme Court of California thoroughly support its statement of the law. It is contended that the additional authorities hereinbefore cited by respondent on this point demonstrate, if need be that the principle is well settled.

Hence the specific instructions proposed by petitioner and refused on this subject could not legally be considered as instructions bearing upon the defense of assumption of risk at all and could not therefore, have been given at all as they ended in both instances with a preemptory instruction that the plaintiff could not recover at all, that is that the jury should find a verdict for the defendant. But the subject matter thereof, being only contributory negligence, if anything, such negligence was not a bar. They were not correct statements of the law, and under the particular facts of this case they were argumentative and invaded the province of the jury.

III.

Reply to Petitioner's Fourth Specification of Error

"Refusal of Instructions Concerning Disobedience of of Instructions Given for Respondent's Safety"

Under this heading counsel contends petitioner was denied another right given him by the Jones Act by the court's refusal to give his proposed instruction number VIII (R. 95). This is to the effect that if he disregarded specific orders as to the precautions he should take in doing the work and was injured because he disregarded such specific orders, that the plaintiff could not recover at all.

The answer to this contention is that the case went to the jury upon the general issue as to whether the defendant furnished plaintiff with a reasonably safe place to work.

Counsel refers to the testimony of Captain Samuelson that he had told respondent "not to go inside the load", whatever that may have meant. But we have shown that this alleged instruction according to the captain was shortly after 8 o'clock in the morning, when they were not even working on the landed slingloads next to the open hold but were on top of the heavy timbers, a place of safety; and we have heretofore shown that any such alleged instruction was denied completely by Spencer, a seaman of 8 years' experience on steam lumber schooners, and that he did not need any instructions, and that if he did not know how to do his work that they would fire him. As to Kruse's testimony, we have shown also that he testified that when he saw Spencer and his partner that they were working up even with the heavy timbers whereas it was undisputed that at the time the slingload toppled with Spencer that they were down 6 feet below the heavy timbers. The general verdict of the jury imports findings in favor of respondent upon these issues and hence petitioner could not have been injured by the refusal to give such an instruction. Counsel for petitioner does not contend that this

instruction involved the defense of assumption of risk. It does not mention the subject. It involved at best only contributory negligence, not a bar to the action.

Counsel cites *Grunert* v. *Bush Terminal Co.*, 47 F. (2d) 565. But this was not an action under the Jones Act but was a libel in admiralty brought by the administratrix of a float-man in the employ of the Bush Terminal Company, working aboard a tug in a harbor, and as pointed out by the Supreme Court of the State of California, such employees may be properly excepted from the broad general class of seamen, probably because they are not attached to a ship which goes out in the ocean and are not members of the crew of any certain vessel, do not live thereon, and are not subject to the usual orders and discipline enforced aboard a sea-going vessel, and hence are more analogous to land workers (R. 104). (*Skolar* v. *Lehigh Valley Ry. Co.* 60 F. (2d) 893; *Scheffler* v. *Moran Towing & Transp. Co.*, 1934 A. M. C. 441).

There was no dispute as to the instructions in the Grunert case. The case was not decided on the theory of assumption of risk at all but the theory that there was no negligence whatsoever on the part of the respondent and that the libelant was injured solely on account of his own negligence. Even then the court refuses to consider what would have been the situation had the libelant been unable to hold on to the rail with one hand as he had been cautioned to do.

Counsel cites *United States* v. *Lindgren*, 281 U. S. 38; saying that this court holds in that case that the defense of assumption of risk was available to the employer under the Jones Act and that the charge of negligence was furnishing an unsafe place to work. We have carefully

searched that decision and fail to find anything therein that justifies such statement. The only portion applying upon the allegations, and the finding of the trial court or the holding of this court, is where this court points out " * * * the libel does not allege unseaworthiness of the vessel and is based upon negligence alone" 281 U. S. 38, 47 and:

> "The district court found that Barford's death was caused by the negligent installation of the releasing gear in the lifeboat, which permitted it to fall and made this device unseaworthy." 287 U. S. 38, 42.

As far as it appears from the case there was no allegation whatsoever of negligence in furnishing an unsafe place to work and nothing whatsoever in the opinion of this court holding that the defense of assumption of risk was available. The defense is not mentioned. The decision is based entirely on the holding that there was no evidence that the deceased seaman did not leave any surviving heirs of the classes designated as beneficiaries by the Federal Employers' Liability Act who were dependent upon him and hence that under the Jones Act there was no cause of action, and there was no cause of action stated under the old maritime rules on account of unseaworthiness for the reason that the libelant did not allege unseaworthiness and further for the reason that there was no right under the old maritime laws to recover indemnity for the *death* of a seaman although caused by unseaworthiness. And hence that the decree of the Circuit Court of Appeals reversing the decree in favor of the libelant and dismissing it, must be affirmed. Of course, this court further holds that the Merchant Marine Act or the Jones Act, superseded the State Act of Virginia permitting a decedent's personal representative to recover

damages for the death of his decedent arising from the negligent or wrongful act of another.

It was generally held under the old rules of master and servant that a violation of instruction was contributory negligence and not assumption of risk. *Warren* v. *Jackson*, 204 Ill. App. 576. And it was not even considered contributory negligence where obedience to the rule or instruction was not practicable, (*Homes* v. *S. P. Co.*, 120 Cal. 357) or where it was impossible (*Larkin* v. *New York Telegraph Co.*, 220 N. Y. 27), or where a compliance with the rule would have placed the servant in a position as dangerous as that which he assumed by disobeying the rule. (*Anderson* v. *American Lumber Co.*, 138 La. 709.)

IV.

Reply to Petitioner's Fifth Specification of Error

"Refusal to Instruct That Maintenance of Open Holds During Loading and Discharge of Vessel Is One of the Ordinary and Obvious Risks Assumed by Seamen."

Petitioner contends that he was deprived of a right privilege or immunity under the Jones Act by the court's refusal to give his instruction number XIX (R. 98). This instruction flatly requests the court to instruct the jury that the respondent assumed the risk of any injury from a fall into the open hold merely by reason of the fact that he helped remove the hatches and that he knew that the hatches were off, providing the absence of the hatch covers was obvious and apparent. It did not correctly state the law, and it invaded the province of the jury as to questions of fact. The fact that respondent helped re-

move the hatches was not against respondent for the reason that he had nothing to do with it but was doing such work under the orders of petitioner's agent the first mate, and this was improperly included in the instruction. The fact that he knew that the hatches were off did not suffice to compel respondent to assume the risk of being injured by a fall into the hold, 56 *C. J.* 1100; *Grant* v. *U. S. S. B. E. F. Corp.*, 22 Fed. (2d) 488, 491. It appears from counsel's brief (Br. 32) that his only objection to the court's refusal to give this instruction was that it was an indication to the jury that they could find that an open hatch was an ordinary incident of the respondent's employment. It is submitted that certainly this is not a tenable reason, making it proper and correct, for the proposed instruction does not purport to instruct the jury to such effect. As pointed out by the Supreme Court of the State of California in its opinion in this case:

> "The reliance upon the statement in *The Gladiolus*, 21 Fed. 417, that leaving open a common between-deck hatchway while the vessel is lying in port is not presumptive evidence of negligence, is insufficient to require a reversal of the judgment in the present case. There was no contention made in this case that merely leaving the hatch open constituted negligence There is involved the additional elements of the negligence of the defendant in furnishing to the plaintiff an unsafe place to work." (R. 105.)

Petitioner's contention that open hatchways are not *necessarily* negligence, is conceded. Respondent has never contended otherwise. But nevertheless leaving a hold open and unguarded has been held in many cases to be negligence, and of course it depends upon the circumstances of the case. It is contended that under the admitted circumstances of this case, it was gross negligence.

Counsel cite *Smith* v. *United States,* 18 Fed. (2d) 110, 111. This case was not an action under the Jones Act but was a libel in admiralty brought against the ship. The Jones Act is inapplicable when an action is brought in *rem*; in such a case the old law prior to the Act is applicable. *The James E. Ferris,* 1932 A. M. C. 1410 (U. S. D. C. W. D. N. Y.) "*McLean* v. *Ferris.*" But in the Smith case the libelant was not ordered in any event to perform any duties around hatch number 2 and had no necessity to go there. The ship was in process of loading. The general statement which counsel cite from that case might or might not be applicable to any specific case. In the Smith case the hatch covers had been removed by the ship's crew and the Court holds: "therefore if there was any negligence, it was on the part of fellow members of the crew, and the libelant cannot recover from the owner or ship for this." Since under the Jones Act the fellow servant rule has been abolished as a defense, the case would not be applicable in any event.

Counsel's Seventh, and his Eighth, and Ninth Specification of Error make practically the same contention as this Fifth Specification of Error.

V.

Reply to Petitioner's Sixth Specification of Error

"Refusal to Instruct Upon the Legal Effect of Assumption of the Risk and That If Proven to the Satisfaction of the Jury This Defense Is a Complete Bar to the Action."

Under this specification counsel contends that this court should reverse the judgment of the Supreme Court of the State of California for failure to give

petitioner's proposed instruction number II (R. 94). But he has already presented this instruction and discussed same under his First and Second Specifications of Error (Pet Br. 28) and we have replied to same there. (Point I.) Counsel presented the same case there as he presents under this specification, *Skolar* v. *Lehigh Valley R. R. Co.*, 60 F. (2d) 893, the citation of which has already been met (Res. Br. I) and we have further shown that the instruction was entirely too broad and general; failed to define the defense at all, and failed to state under what facts it would be applicable if at all; and was not applicable under the facts of this case. Counsel quotes a purported passage from the decision in *Skolar* v. *Lehigh Valley R. R. Co., supra,* (Pet. Br. 34) which does not appear in that decision at all. That quotation is, however, from the case of *Southern Ry. Co.* v. *Hermans,* 44 Fed. (2d) 366, cited under the quoted phrase. But in the Hermans case again, the seaman was merely a harbor-worker employed on the defendant's tug. It is noteworthy that the U. S. Circuit Court of Appeals says in the case of *Southern Ry. Co.* v. *Hermans,* 44 Fed. (2d) 366:

> "It was clearly a matter for the jury to determine whether the intrusting of this responsibility to the deckhand charged with other duties was an adequate performance of the defendant's duty to exercise reasonable care to furnish its employees with a reasonably safe place in which to work."

Counsel refers to *Pryor* v. *Williams,* 254 U. S. 43, but this was an action under the Federal Employers' Liability Act, which it has been shown is governed by different considerations and instructions on assumption of risk, than are actions under the Jones Act.

Counsel also cites *McMyler Mfg. Co.* v. *Mehnke,* 209 Fed. 5. That case was decided before the Jones Act was enacted. It was an action brought by a machinist against a manufacturing company under the law of master and servant, and hence it is submitted would not be in any event a binding authority against a seaman in an action under the Jones Act.

Counsel cites *McGinn* v. *North Coast Stevedoring Co.,* 149 Wash. 1, under his statement that:

> "the refusal to instruct the jury upon the legal effect of assumption of the risk denied petitioner a very substantial right under the Jones Act." (R. 35.)

But the case cited was not an action brought under the Jones Act, and plaintiff and respondent was a stevedore and not a seaman. The case does not hold any such thing as counsel indicates, but the judgment in favor of the stevedore was reversed for the sole reason that the Supreme Court of Washington held that it was prejudicial error for the trial court to refuse to give a requested instruction defining a *latent defect.* (149 Wash. 20). We have heretofore cited this case as an authority for respondent for the reason that the Supreme Court of Washington lays it down as a rule of the common law.

> "(12) The law is also well settled that the employee does not assume the risk of his employer's negligence or the negligence of his agents or employees in the nonperformance of a nondelegable duty. *Arneson* v. *Grant Smith & Co.,* 120 Wash. 98, 206 P. 960; *Mattson* v. *Carlisle Packing Co.,* 123 Wash. 243, 212 P. 179."

And we have heretofore shown that the duty of an employer to furnish his employee with a reasonably safe

place to work is a primary and non-delegable duty.

VI.

Reply to Petitioner's Seventh Specification of Error

"Maintenance of Open Cargo Hold During Loading and Discharging Is Not Negligence"

Counsel for petitioner under this point contends generally that an open hatchway on a ship is not evidence of neglect. That is too broad a statement. It depends entirely upon the circumstances. Counsel under this point does not discuss assumption of risk. The instruction which petitioner contends should have been given is his instruction number VI (R. 95) asking the court to instruct the jury flatly.

> " * * * that it is not negligence for the defendants to have the hatches of the Fort Bragg off while she is in port loading or discharging cargo from her hold."

In the first place the instruction was not at all applicable under the facts as it was undisputed and admitted that the vessel was not loading or discharging any cargo from her hold; at least the entire morning that respondent was hurt.

Counsel cites *Dwyer* v. *National S. S. Co.*, 4 Fed. 439, but there the decedent was a land employee employed by an independent contractor. He had been working in the hatchway itself. He stepped upon a section of the grating of the hatch and it tilted under his weight and he fell through the hatchway. The court says:

> "If I were convinced that the condition of the hatchway at the time of the accident was proof of a

> failure on the part of the defendant to discharge a duty attaching to him in respect to the hatchway, I should find no dfficulty in holding the defendant liable whether the grating was misplaced by the stevedores, the elevator men, or the crew of the vessel."

Counsel's next case, *The Gladiolus,* 21 Fed. 417 (1884) involved a fall by a stevedore through a coal bunker hatch. There was no deck load involved. The court says:

> "The leaving open a common between-deck hatchway, while the vessel is lying in port, *under ordinary circumstances,* is not presumptive evidence of negligence on the part of the ship." (Italics ours.)

Counsel's next case, *The Kongosan Maru,* 282 Fed. 666, in contrary to his contention for there it was held that it was negligence under the circumstances of that case to leave the hold open and unguarded and the plaintiff recovered against the stevedoring company by whom he was employed. The action was not brought under the Jones Act but was a libel *in personam* in admiralty.

In counsel's next case, *Long* v. *Silver Line,* 48 Fed. (2d) 15, the hold was not involved at all, but some large steel tanks were necessarily left uncovered for ventilation for the reason that they were to be immediately repaired.

In counsel's next case, *Campbell* v. *Trinidad Shipping & Trading Co.,* 165 Fed. 270, the seaman was not in the course of his duties and was sitting upon the hatch coaming drinking tea, when he fell into the hold. The accident occurred about 7 o'clock in the evening, some hours after work had been terminated. The case is otherwise not applicable.

Counsel's next case *Horne* v. *George H. Hammond Co.,* 71 Fed. 314, is not in point in any way and on the con-

trary makes it very clear that the question of open holds is one depending entirely upon the circumstances of each case as the court there says:

> "the issue is not so brought as to touch upon the duties and responsibilities connected with a ship's hatchway at all times or towards all persons. * * * These duties and responsibilities undoubtedly involve mixed questions of law and fact."

The court states that while under ordinary circumstances it is not evidence of neglect of duty on the part of the shipowner to have an open hatchway, while the hatchway is being employed, that:

> "Of course, like all rules disposing of issues of mixed law and fact, the courts are not permitted to follow it implicitly except in what may be classed as ordinary cases."

Also in counsel's case of *The Gladiolus,* 21 Fed. 417, supra, the court point out that the question as to whether or not leaving the hatch open is negligence, depends upon the circumstances of each case.

It has, of course, been held in many cases to be negligence under the particular circumstances of each case. This court in *Cortes* v. *Baltimore Insular Line,* 287, U. S. 367, 375, expressly recognizes that it is one of the common acts of negligence in seamen's cases.

And in *Petersen* v. *Klitgaard,* 212 Cal. 516, the Supreme Court of California says that the duty of the officers of the ship to close the hatch "depends upon the situation".

In *Domandich* v. *Doratich,* 165 Wash. 315, the captain admitted that it was the rule that the hatch was to be kept covered at all times when not in use, (just as Cap-

tain Samuelson did in the instant case.) It was left open when not in use; plaintiff fell into the hold in the evening and had a verdict and judgment for damages, which was affirmed on appeal.

In *Engfors* v. *Nelson Steamship Co.*, 131 Ore. 108, the verdict and judgment of the trial court in favor of the seaman was affirmed, partially at least upon the ground that it was negligence under the particular facts of that case to fail to protect the open hold with a guard along the coaming to prevent workmen from falling into the hold, and in that particular case the hold was being used.

Therefore it is contended that it was not error to refuse to instruct the jury generally as petitioner requested that it was not negligence to leave the hatch open, even if petitioner had not added the subsequent portion making the instruction entirely inapplicable "while she is in port loading or dischargng cargo from her hold."

VII.
Reply to Petitioner's Eighth and Ninth Specifications of Error

"Instructions Given and Refused Concerning the Open Hold in Relation to Safety of Place of Work and Proximate Cause."

Under these specifications of error petitioner groups his objections to two instructions given by the court, as requested by respondent, and one instruction given by the court of its own motion, and one instruction, number II proposed by petitioner and given by the court as amended.

Petitioner complains because the court instructed the jury that the lumber on the deck upon which respondent

was standing next to the open hold, constituted the place furnished by the defendant employer for the prosecution of further work. Petitioner contends that by this instruction the jury were told to consider the open hold and to decide whether that fact rendered the plaintiff's place of work unsafe. But this criticism is not tenable. On the contrary such criticism is obviated by Instruction No. XV-a (R. 91) which petitioner complained of, given by the court of its own motion, whereby the court instructs the jury that in order to determine whether the petitioner provided respondent with a reasonably safe place to work that they must consider "not one condition alone, but the whole situation as presented by the evidence at the time of the accident". The whole situation could not possibly be merely the open hold. But respondent's position on top of the landed slingloads where he had been ordered to work was, of course, his place to work. It could not be otherwise. If the petitioner saw fit to leave the hold open immediately adjacent to where respondent had to stand, when there was no occasion to leave the hold open, and when there was a protest, and when it could have been speedily closed, the petitioner could not well expect the jury or the court to close their eyes to the fact that the open hold was a component and immediate part of the place of work. One of the leading cases defining the place of work is *Sebald Brewing Co.* v. *Tompkins,* (C. C. A. 6th) 221 Fed. 895, where a workman fell through a hole on a roof, to the concrete floor of the room below. And the court says:

> " * * * we think that any part of the roof, as near the boards as the portion of the roof was through which the plaintiff fell, may well be found by the jury to be a place furnished by the company for its employees to work."

And in *Blosky* v. *Overseas Shipping Co., Inc.*, 219 App. Div. 438, where plaintiff was a longshoreman not suing under the Jones Act the Court says:

> "It is one of the fundamental principles applicable to the relation between employer and employee that the employer is charged with the positive duty of furnishing to his employees a safe and proper place in which they are to do the work required of them. This duty extends to the premises in which the employees are put to work; the machinery supplied for doing the work, and all of the appliances provided for their use."

It is contended that instruction number XV-a was a very favorable one to the petitioner as it is calculated to take the jury's mind away from the open hold which the petitioner most desired, and to place it upon the broad general ground as to whether or not under all the circumstances of the business the petitioner had furnished his seamen with a reasonably safe place to work. In considering the negligence in refusing to close the hold it is quite apparent that if respondent had fallen with the toppled boards from the slingloads only 6 feet to the hatch covers if they had been on over a *closed* hold, he might not have been injured at all, or only very slightly, but the hold being open, causing him to fall 18 feet to the bottom of the hold, it is quite apparent that the open hold contributed proximately to his injuries. As to petitioner's Instruction No. XIV (R. 97) which counsel refer to in the body of the argument (Br. 40) but not in its premise, which instruction petitioner proposed and which was refused, this was an attempt to have the jury instructed that they could not consider the open hold at all as negligence and that it could not be the proximate cause of the plaintiff's injuries. The instruction did not comport with

the facts and furthermore is not correct as a matter of law. In 45 *C. J.* 920, the rule is set forth:

> "Where the injury results from two or more causes for all of which defendant is liable, it is immaterial which was the proximate cause."

Furthermore it is well settled that the question as to what actually constitutes proximate cause is for the jury. There was only one general act of negligence alleged and that was in failing to provide the plaintiff with a reasonably safe place to work and the court specifically instructed the jury that they could not find a verdict against the defendant unless his negligence was the proximate cause of the plaintiff's injuries (R. 149) Instructions XXVIII, XXIX. Also Instruction No. II (R. 91) requested by petitioner and given, as amended.

The Controversy Does Not Present a Federal Question of Gravity and General Importance

Although petitioner's counsel makes considerable argument as to what the facts were in this case and as to the jury's being permitted to consider the open hold as a portion of the place to work, it is submitted that the only real contention which has any shadow of merit is that the petitioner was deprived of a right, privilege, or immunity under a statute of the United States, to-wit, the Jones Act, by the court's refusal to give certain specific instructions allegedly bearing upon the defense of assumption of risk.

The respondent has never contended but what the defense of assumption of risk when available under the facts, was available as against a seaman under the maritime law. The Supreme Court of the State of California

in its judgment now under attack, expressly recognizes that such a defense is available in actions under the Jones Act when applicable under the facts of some particular case. But under the facts of the instant case, even under the common law, it is submitted that the defense would not have been available. And the determination of the common law is exclusively within the jurisdiction of a state court and this case could have been decided on that basis alone. *McGinn* v. *Northcoast Stevedoring Co.*, 149 Wash. 1.

The decisions of this court establish that under the principles of the common law even a land worker does not assume the risk of his employer's negligence in failing to make the work place reasonably safe. *Hough* v. *Railway Co.*, 100 U. S. 213, 215; *Chesapeake & O. Ry.* v. *Proffitt*, 241 U. S. 462, 469. And in the last mentioned case, this court considers instructions similar to those proposed by petitioner here to be entirely improper and inapplicable under well settled principles. The same rule obtains in the lower Federal Courts. *Cincinnati, N. O. & T. P. Ry. Co.* v. *Hall* (C. C. A. 6th) 243 Fed. 76, 80; *Panama R. Co.* v. *Johnson* (C. C. A. 2nd 289 Fed. 964, (quoting from *Labatt on Master and Servant*, vol. 4 (2d. Ed.) p. 3934); *Harvey* v. *Texas & Pacific Ry. Co.*, (D. C. M. D. Pa.), 166 Fed. 385, 392; and in the state courts, *Hoogbruin* v. *Atchison R. Co.*, 213 Cal. 582, 592; *Devaney* v. *Atchison etc., Ry. Co.*, 219 Cal. 487; *Boatman* v. *Miles*, 27 Wyoming 481.

And the common law rule as to the non-assumption of risk by a servant when he is working under any kind of coercion, is practically the same as it is with regard to a seaman. 39 C. J. 794; *Shearman & Redfield on Negligence*,

vol. 1 (6th ed.) sec. 211a; *Panama R. Co.* v. *Johnson* (C. C. A. 2d) 289 Fed. 964.

This court has said in a great many cases that where the record shows that, although there may be a federal question in the case, there is also an independent question not federal in character, decided by the state court, which is in itself broad enough to sustain the judgment, the state decision is not reviewable by this court. *Winter City Counsel* v. *Montgomery,* 156 U. S. 385; *Johnson* v. *Risk,* 137 U. S. 300.

Also the judgment of the Supreme Court of the State of California is by no means a decisive decree that assumption of risk is not available as a defense under the Jones Act, but on the contrary, assumes that it is. And hence the judgment does not actually raise a federal question.

This court has held that it did not regard the inquiry as to:

> "whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment was properly applied on the trial of this case as falling within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them." *In the Matter of John Woods,* 143 U. S. 202.

In *Houston Oil Co.* v. *Goodrich,* 245 U. S. 440, the grounds of Petition for Writ of Certiorari were the refusal of the trial court to submit certain questions to the jury; (substantially the grounds in the instant case.) But the court says:

> "The propriety of submitting these matters de-

pended essentially upon an appreciation of the evidence. Having heard it all, the trial court concluded there was not enough in support of any one of petitioners' above-stated claims to warrant a finding in their favor, and the circuit court of appeals reached the same result. 141 C. C. A. 264, 226 Fed. 434.

The record discloses no sufficient reason within the rule long observed why we should review the judgment below. *Forsyth* v. *Hammond,* 166 U. S. 506, 41 L. Ed. 1095, 17 Sup. Ct. Rep. 665.

Dismissed."

It is submitted that the main weakness in petitioner's application is that he cannot, or does not, controvert in any way the authorities cited by the Supreme Court of the State of California in support of its decision. Not a one of them is even assailed. This is, it seems, in the nature of an admission that those authorities do amply support the judgment he attacks and if this be admitted, then such judgment is not in conflict with any decision of this court or of any Federal Court and petitioner shows no ground whatsoever for the application for the writ.

A mere error of judgment by the state court, in misapplying the law or adjudging the facts but adjudging nothing obnoxious to the constitution, treaties or laws of the United States, does not make its judgment reviewable (*Columbia Ry., Gas & Electric Co.* v. *South Carolina,* 261 U. S. 236) unless the error is so gross and the decisions so arbitrary or fraudulent as to deny due process of law or the equal protection of the laws. (*Baker* v. *Druesedow,* 263 U. S. 137.)

This court has already considered the same points as now raised in *Panama Railroad Co.* v. *Johnson,* 264 U. S. 375, 393.

In that case this court affirmed the judgment of the Circuit Court of Appeals in favor of the seaman under the Jones Act; the judgment under review largely defining the application of the defense of assumption of risk as against a seaman. In considering the effect of the denial of requested instructions on assumption of risk this court says:

> "The defendant also complains that two requests which it preferred on the subject of assumption of risk were denied. The requests were so framed that, considering the state of the evidence, they would not have conveyed a right understanding of the subject, and might well have proved misleading. Their refusal was not error." (264 U. S. 393.)

CONCLUSION

This respondent seaman tried his case in the state court for many days before a jury at a very great expense, and obtained a verdict of the jury for $10,000.00 which the trial court reviewed and reduced the judgment to $7,000.00 and denied the motion for new trial. This is the fourth reviewing court which has been asked to review the record and if and when the judgment in favor of this respondent becomes final, the petitioner can still take the respondent into the U. S. District Court and seek to limit his liability. The seaman's injuries were sustained on May 4, 1931.

It is submitted that in view of the foregoing authorities, that the judgment of the Supreme Court of the State of California in this case is legally correct, and in view of the particular facts, eminently just, and in accord with that liberal construction of the Jones Act which this court enjoined in its two decisions of *Bainbridge* v. *Merchants*

& *Miners Transp. Co., supra,* and *Cortes* v. *Baltimore Insular Line, supra.* The judgment of the Supreme Court of the State of California is also thoroughly in accord with section 4½ of Article 6 of the Constitution of the State of California, providing:

> "Sec. 4½. No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (As amended November 3, 1914.)

It was nothing new, as shown, to send the case to the jury upon the issue of safe place to work, *Hanson* v. *Luckenbach Steamship Co., Inc., supra; States Steamship Co.* v. *Berglann, supra.* Petitioner's counsel themselves admitted that if the court had properly instructed the jury on negligence that the respondent was probably entitled to send the case to the jury on the issue of safe place to work.

If the judgment should now be reversed by this court and this respondent seaman be compelled to go back and go through all of the long trial again before a jury with the consequent heavy expenses, it is inconceivable, under the facts of this case, how the petitioner could obtain any different result, with any instruction given which this court might hold must be given. Where that is the condition of the case, it is submitted that the judgment will not be reversed merely for failure to give an instruction. *Devaney* v. *Atchison,* 219 Cal. 487, 495; *Jackson* v. *the Lac-*

tern Co., 209 Cal. 520; *Dullanty* v. *Smith*, 203 Cal. 621; *Fox* v. *Ravera*, 122 Cal. App. 35; 2 *Cal. Jur.* 981.

It is submitted that this case does not present a federal question of gravity or general importance, and therefore that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN L. MCNAB,
A. DON DUNCAN,
Attorneys for Respondent.

APPENDIX

SUPREME COURT OF THE UNITED STATES

No. 676

October Term, 1935

GEORGE S. BEADLE,
Petitioner,

vs.

ALFRED SPENCER,
Respondent.

Affidavit of A. Don Duncan Regarding Admission in Appellant's Opening Brief.

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO—SS:

A. DON DUNCAN being first duly sworn deposes and says:

That he was at all times in the Courts of the State of California, the attorney for the respondent above-named, and is familiar with and personally handled the preparation of all briefs therein, and that said affiant's name is now on the brief before this court on Petition for Writ of Certiorari.

That the following appears in the opening brief filed in the District Court of Appeal of the State of California by above named George S. Beadle, as defendant and appellant in the said case.

"Had those physical conditions which did not, as a matter of law, constitute negligence, and which could not, as a matter of law, be the proximate cause of the plaintiff's fall, been eliminated by the trial court, or had it given proper instructions as to each act of negligence relied upon, as it should have done, the plaintiff would, perhaps, be entitled to have the case sent to the jury upon the issue of safe place to work."

(Signed) A. DON DUNCAN.

Subscribed and sworn to before
me this 29th day of January, 1936.

(Seal) Louis Wiener,
Notary Public in and for the City
and County of San Francisco.

pp. 1, 3

SUPREME COURT OF THE UNITED STATES.

No. 676.—October Term, 1935.

George S. Beadle, Petitioner, vs. Alfred Spencer. } On Writ of Certiorari to the Supreme Court of the State of California.

48 P.(2d) 678,

[April 27, 1936.]

Mr. Justice Stone delivered the opinion of the Court.

In this case certiorari was granted, — U. S. —, to review a ruling of the Supreme Court of California, — Cal. —, that assumption of risk is not a defense to a suit brought by a seaman under the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, to recover for personal injuries due to the negligent failure of the officers of the vessel to provide him with a safe place in which to work.

Respondent was employed by petitioner as a seaman on a coasting vessel. While engaged in unloading lumber from the deck he was injured by a fall into an open hatch. On the trial there was evidence from which the jury could have found that the deck of the vessel, from the bulwarks to within about forty inches of either side of the hatch coamings, was loaded with heavy timbers, and that the remaining deck space, at the sides of the hatch, was loaded with loose lumber, consisting of pieces 2″ x 3″ and 1″ x 12″, to a height five or six feet above the deck; that this lighter lumber, or a substantial part of it, had been loaded in sling loads, without re-piling, in such negligent fashion as to render it unstable; that the pile of lumber, with the open hatch alongside, constituted an unsafe place to work for those required to go upon it, as the master knew; and that the upper part of the pile of lumber, on which respondent was standing in order to adjust a sling about some of the lumber to be unloaded, toppled over because of its instability, throwing him through the open hatch into the hold and causing the injuries complained of. The trial court refused requests to charge that assumption of the risk by respondent was a defense, but left it to the jury to say whether there was negligent failure of the master to provide a safe place for the respondent to work, and whether the failure was the proximate cause of the injury. It re-

duced the jury's verdict for respondent and gave judgment accordingly, which the state supreme court sustained.

Numerous grounds for reversal are urged here, of which only two require our notice. One is petitioner's contention that even though assumption of risk is not generally a defense to a suit brought under the Jones Act, it must be deemed available where, as in the present case, the injured seaman is employed on a coasting vessel which was in port at the time of the accident. It is argued that as he was not required to sign articles, 18 Stat. 64, 46 U. S. C. § 544, compare 46 U. S. C. § 563, and consequently was not subject to the punishment for desertion prescribed by 46 U. S. C. §§ 701-713, he was free to avoid the risk by leaving the vessel and his employment. The other objection is that the trial court erred in refusing petitioner's request to charge that if the jury should find that respondent, in placing the sling underneath the lumber, "chose to perform the act in a dangerous manner such as stepping too near the edge of the deck load when there was a safe method of doing the work involving no risk of the edge of the deck load giving away, then the plaintiff cannot recover."

1. The effect of the Jones Act in bringing into the maritime law new rules of liability prescribed by the Federal Employers' Liability Act, has been considered in No. 667, *The Arizona*, decided this day, and does not require extended discussion here. The injury resulting to the employee from the negligently piled lumber, in proximity to the open hatch, is made actionable by the Jones Act, by its adoption for the maritime law of the provisions of the Employers' Liability Act, which specifically imposes liability for negligence of officers and fellow employees, and for defects in equipment due to negligence. See *Zinnel* v. *U. S. S. B. E. F. Corp.*, 10 F. (2d) 47; *The Valdarno*, 11 F. (2d) 35; *Howarth* v. *U. S. S. B. E. F. Corp.*, 24 F. (2d) 374; *Hanson* v. *Luckenbach S. S. Co.*, 65 F. (2d) 457. Before the enactment of the Jones Act it was recognized that a "failure to supply and keep in order the proper appliances appurtenant to the ship" is equivalent to unseaworthiness, and that it was likewise actionable under the maritime law, if it caused injury to a seaman. See *The Osceola*, 189 U. S. 158, 175. Judge Addison Brown, sitting in admiralty, had allowed recovery to a seaman for injuries received in unloading lumber in circumstances substantially like the present, in *The Frank and Willie*, 45 Fed. 494, cited with approval in *The Osceola, supra*, 174.

See also *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255; *Olson* v. *Flafel*, 34 Fed. 477.

2. It is unnecessary to repeat here the reasons given in the opinion in *The Arizona*, *supra*, for our conclusion that assumption of risk is not a defense to a suit brought by a seaman under the Jones Act for negligent failure of the master to provide safe appliances or a safe place in which to work. Those reasons neither require nor admit of a different rule because of the circumstances of respondent's employment on which the petitioner relies. The rules, peculiar to admiralty, of liability for injuries to seamen or others, are as applicable when the injury occurs upon a vessel in port as when at sea, although the common law may apply a different rule to an injury similarly inflicted on the wharf to which the vessel is moored. *The Frank and Willie*, *supra*; and see *Northern Coal and Dock Co.* v. *Strand*, 278 U. S. 142; ~~*Nogueira*~~ v. *N. Y., N. H. & H. R. Co.*, 281 U. S. 128; *Baizley Iron Works* v *Span*, 281 U. S. 222; *Employers' Liability Assurance Corp.* v. *Cook*, 281 U. S. 233; *Uravic* v. *Jarka Co.*, 282 U. S. 234.

Nor do we perceive any adequate ground for judicial relaxation of the admiralty rule, applicable under the Jones Act, that assumption of risk is not a defense to a suit to recover for injury to a seaman resulting from unseaworthiness or defective equipment, because he chances to be in some measure less amenable to the iron discipline of the sea than others who go upon foreign voyages. Even so his freedom to avoid the risk is far from comparable to that of the employee on land where the defense of assumption of risk originated and has been maintained. No such distinction appears to have been recognized in the maritime law. And we discern nothing in the purpose or in the language of the Jones Act or in the rules of liability which it prescribes to suggest that Congress undertook to introduce such a distinction into the maritime law.

It is unnecessary to decide whether employees on a vessel who are not seamen according to the maritime law, but who have been given the status of seamen for the purpose of enabling them to bring suit under the Jones Act, see *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, are entitled to the immunity from the defense of assumption of risk accorded by the maritime law to seamen. Cf. *Scheffler* v. *Moran Towing & Transportation Co.*, 68 F. (2d) 11; *Skolar* v. *Lehigh Valley R. R. Co.*, 60 F. (2d) 893.

3. We find no prejudicial error in the refusal to give the requested charge as to the respondent's use of the sling. The trial judge did charge the jury that there could be no recovery unless it found that negligence of petitioner was the cause of the injury. Respondent was using the defectively piled lumber as a platform on which to stand when adjusting the sling under some of the lumber about to be unloaded. There is no suggestion in the evidence or by petitioner's requests that he could have stood elsewhere when performing that operation, or that he had any choice but to do his work there or leave the vessel. It may be that he was negligent in standing at one point rather than at another upon the unsafe pile of lumber, see *Seaboard Air Line Co.* v. *Horton,* 233 U. S. 492; cf. *The Frank and Willie, supra,* and that an instruction as to the effect of his negligence would have been appropriate. But we think the charge in the form requested, so far as applicable to the evidence, and in view of that actually given, amounted to no more than a request to charge that his negligence was a defense. Contributory negligence is not a defense to a suit brought either under the Jones Act or under the maritime law for injuries attributable to negligently defective equipment. Under both it is ground only for apportionment of the damage, see *The Frank and Willie, supra;* 35 Stat. 66, 45 U. S. C. § 53. So far as the record discloses petitioner made no request for an instruction as to apportionment of the damage.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.